

2014 WL 9911048 (Kan.Dist.Ct.) (Trial Motion, Memorandum and Affidavit)

District Court of Kansas.
Eighteenth Judicial District
Civil Department
Sedgwick County

Byron T. WIECHMAN, Plaintiff,

v.

BENCHMARK INSURANCE COMPANY, Claims Professionals, Inc., and Mark Huddleston, Defendants.

No. 2013CV000731.
July 23, 2014.

**Plaintiff's Response Opposing Defendant Mark Huddleston's Adoption of
Grounds a, b, c, e and f of Defendants' Amended Motion for Summary Judgment**

[Robert \(Rocky\) D. Wiechman, Jr.](#), 727 North Waco, Suite 278, Wichita, KS 67203, (316) 264-2115.

[Ron D. Beal](#) #11635, 9927 Redbud Lane, Lenexa, Kansas 66220, (913) 940-7607, for plaintiff Byron T. Wiechman.

Plaintiff seeks to recover the \$25,000 contract amount provided in the written settlement agreement of the parties. In July 2013, plaintiff timely served a motion for summary judgment. In August 2013, defendants served their joint "Amended Motion For Summary Judgment" (hereinafter "the Amended Motion"). In September 2013, Judge Mark Vining disqualified Frank Hummer from representing defendant Mark Huddleston ("defendant") because of his serious conflict of interest. *See Plaintiff's Response To Second Amended Motion For Summary Judgment*, pp. 70-74.

Replacement counsel for defendant Huddleston appeared and, on November 13, 2013, served a pleading notifying the Court and the parties that "defendant Mark Huddleston adopts the arguments set forth in defendants' amended motion for summary judgment under sections a, b, c, e, and f but not d." *See "Defendant Mark Huddleston's Separate Response To Defendants' Amended Motion For Summary Judgment and Plaintiff's Motion For Partial Summary Judgment,"* p. 4. Also, defendant Huddleston stated as follows:

"It appears from the documentation that there was a meeting of the minds between plaintiff's attorney and Mark Huddleston's insurance company's agent, Michelle [sic] Avery, to settle the case against him for policy limits in exchange for a release of any and all liability of defendant Mark Huddleston, eliminating any personal exposure to him. The release is thus enforceable and the only issue before the court to be decided is what consideration is owed for the release, whether it is \$25,000.00 or the remaining policy limits. Defendant Mark Huddleston believes the court can make that decision by way of summary judgment based upon the documentation attached to both parties' motions for summary judgment, but otherwise takes no position thereon."

Id. at 4. This adopted parts of the amended motion for summary judgment provide no basis for summary judgment for defendant. Defendant argues the three-year statute of limitations bars the action. *Amended Motion*, pp. 24-27. He argues a limitation period of three years applies to the claim because the agreement payment amount was verbal, not written; that Michele Avery and Robert (Rocky) D. Wiechman, Jr. verbally agreed that the payment amount to plaintiff would be \$17,864.86. Also, defendant argues that laches bars the action notwithstanding that a statute of limitations applies. *Amended Motion*, pp. 17-20. Finally, in two arguments, defendant attempts to persuade the Court that he and the insurance companies cannot be bound by settlement agreements freely and voluntarily entered if the total aggregate amount of the settlement plus a payment on a subrogation demand exceeds the limits of the insurance agreement. *Amended Motion*, pp. 20-22; 24.

Summary judgment may be granted if the record shows there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *K.S.A. 60-256(c)(2)*. The burden of proving no genuine issue of material fact rests on the moving party. *Russell v. Braden*, 42 Kan.App.2d 811, 819-20, 217 P.3d 997 (2009). The movant has “the initial burden of establishing there was no genuine issue of material fact and that they were entitled to judgment as a matter of law.” *Matter of Estate of Brodbeck*, 22 Kan.App.2d 229, 235, 915 P.2d 145 (1996). If a motion for summary judgment is properly supported (which defendant has failed to do), the nonmoving party must come forward with specific facts showing that the moving party is not entitled to summary judgment. *K.S.A. 60-256(e)*. See *Mark Twain Kansas City Bank v. Kroh Bros, Dev. Co.*, 250 Kan. 754, 762, 863 P.2d 355 (1992)(to defeat a properly supported motion for summary judgment, the nonmovant must come forward with specific facts.).

The affirmative defense of statute of limitations provides no basis for summary judgment. The movant has failed to meet his initial burden of showing evidence of a verbal agreement as to the payment term, and has failed to show entitlement to judgment as a matter of law. Indeed, their evidence actually shows there was no outward manifestation or expression of assent on the part of plaintiff to be paid only \$17,864.85, Moreover, plaintiff has come forward with specific facts and evidence showing that the parties agreed \$25,000 would be paid to plaintiff to settle, that the agreement was in writing (twice), and that plaintiff commenced this action within the applicable five year statute of limitations. Defendants have fabricated the “verbal agreement” allegation to support a phony statute of limitations defense. See *infra*, pp. 33-46.

The affirmative defense of laches provides no basis for summary judgment. The movant has failed to meet his initial burden of showing that laches even applies, and he has failed to show evidence that each essential element has evidentiary support. Moreover, plaintiff has shown that, because a statute of limitations applies to plaintiffs claim (the five year statute of limitations), the doctrine of laches does not apply. Also, plaintiff has come forward with specific facts and evidence showing the absence of each essential element of laches. See *infra*, pp. 46-61.

Finally, defendants can be and are bound by settlement agreements into which they freely and voluntarily enter even if the total aggregate amount paid exceeds the limits of the insurance agreement. See *infra*, pp. 61-67.

RESPONSE TO THE CONTENTIONS OF “UNCONTROVERTED” FACTS¹

1. Controverted. The referenced evidence does not support the contention that plaintiffs breach of contract action alleged a written contract to pay him “the policy limits ... of the auto liability policy.” The referenced evidence shows an action for breach of a settlement agreement independent of what the policy limits may have been. *Defendant's Exh. A*.

2. Uncontroverted.

3. Uncontroverted.

4. Uncontroverted.

5. Uncontroverted.

6. Uncontroverted.

7. Uncontroverted.

8. Uncontroverted.

9. Uncontroverted.

10. Uncontroverted.

11. Controverted. The evidence of record shows defendants could locate Avery. Gragson testified Avery was located in California. *Defendant's Exh. S*, p. 58/6-9. The amended affidavit of Colleen Loeffelbein, the legal assistant for Frank Hummer, the attorney for all defendants at the time, states that Loeffelbein contacted Avery and Avery stated she lives in California. *Defendant's Exh. E*. Gragson's affidavit states that Avery lives in California. *Defendant's Exh. D*. In answer to interrogatories, defendants admitted that Avery "has moved to California" *Plaintiff's Exhibits* ² 30-32, No. 12; *Plaintiff's Exhibit* 33, p. 5, No. 12 (Avery "has moved to California").

Nevertheless, the "investigators" hired by defendants to find Avery avoided looking for her in California; they looked for her in Missouri and Oklahoma instead, and they spent little time doing so. Exhibit A attached to *Defendant's Exh. D*; Attachment to *Defendant's Exh. E*.

Also, in response to interrogatories on their defense of laches, defendants did not say Avery had not been located and did not say Avery could not be located. *Plaintiff's Exhibits* 30-32, No. 12; *Plaintiff's Exhibit* 33, p. 5, No. 12. To the contrary, defendants conceded she could be located by complaining of "the additional expense of finding her and traveling to take her deposition" *Plaintiff's Exhibit* 33, p. 5, No. 12.

12. Uncontroverted.

13. Uncontroverted.

14. Uncontroverted.

15. Uncontroverted.

16. Uncontroverted.

17. Controverted. The referenced evidence does not support the contention or a letter of CPI of July 10 or that Mr. Wiechman admitted having CPI's letter of July 10 to Plaintiff.

18. Controverted. The referenced evidence does not support the contention that the letter described "the PIP lien" The letters of June 20, July 20 and August 22 neither describe, nor mention nor assert a "PIP lien." See *Defendant's Exhs. G, I and K*.

19. Uncontroverted.

20. Uncontroverted.

21. Uncontroverted.

22. Uncontroverted.

23. Controverted. The evidence of record shows that CPI received responses from Mr. Wiechman. For example, there was a letter from Mr. Wiechman dated August 11, 2006. *Defendant's Exh. J*. In the letter, Mr. Wiechman informs defendants that he represented plaintiff: "My Client Byron Wiechman." *Defendant's Exh. J*.

24. Uncontroverted.

25. Controverted. The referenced evidence does not support the contention that the bills and records contained in the settlement brochure “showed on their face that State Farm had paid them.” The three bills make no such showing, and the Statement Of Account shows a State Farm payment of only \$5,450.25 with a note of “PIP Exhausted State Farm.” *See Defendant's Exh. O.*

26. Controverted. In a letter from Mr. Wiechman dated August 11, 2006, Mr. Wiechman informed defendants that he represented plaintiff: “My Client Byron Wiechman.” *Defendant's Exh. J.* Entries in defendants' Claim Activity Record preceding February 2008 repeatedly refer to Mr. Wiechman as the claimant's attorney. *See e.g., Defendant's Exh. C*, p. 36 (12/27/07 “Gall clmnt's atty”); p. 35 (10/26/07 “cimt has an atty”); p. 34 (10/25/07 “Clmt represented by atty”); p. 33 (10/25/07 “Called clmt's atty 316-264-2155. Mr. Wiechman was no court.”). Entries in defendants' Claim Activity Record show defendants knew of this lawsuit in October 2007. *Defendant's Exh. C*, p. 31 (10/09/07).

27. Uncontroverted.

28. Controverted. The referenced evidence does not support the contention. Also, the insurance policy *Defendant's Exh. B* does not say that a payment by CPI, whether on a subrogation demand or otherwise, and whether before or after the expiration of the statutory 18 month period, reduces the policy limits. *Defendant's Exh. B.*

29. Controverted. The referenced evidence does not support the identification of Gragson deposition exhibit 20.³

30. Controverted. Exhibit 23 to Gragson's deposition was identified by Gragson as a two page exhibit. *See Plaintiff's Exhibit 35*, pp. 137/4 — 138/17, and two pages attached thereto. The first page is the letter from Mr. Wiechman to CPI, dated August 26, 2008, stating that the release was signed, notarized and enclosed. *Id.* The second page is the Release of all Claims. properly signed and notarized, promising that payment of \$25,000 “will be forthcoming.” *Id.*

31. Controverted. The referenced evidence does not support the contention. The referenced evidence is an entry, on October 1, 2008, in the Claims Activity Report, of a telephone conversation Avery had with Mr. Wiechman five days earlier, on September 26, 2008. *Defendant's Exh. C*, p. 44. The entry says Mr. Wiechman advised Avery that the letter of March 12, 2008, “indicates we would issue pymt to him in the amount of \$25K and there is no mention of the lien. He further states if we do not issue payment to him in the amount of \$25K he will sue me.” *Id.* Mr. Wiechman never said he was going to sue Avery personally; he said he was going to sue the insurance company. *Plaintiff's Exhibit 36*, p. 59/15-19; p. 60/2-5. Avery wrote that entry wrong. *Id.* at 59/22 - 60/2.

There is no entry in the Claim Activity Report preceding September 2008 of defendants telling either plaintiff or Mr. Wiechman that CPI intended to pay or had paid the subrogation demand. *Defendant's Exh. C.* There is no letter preceding September 2008 of defendants telling either plaintiff or Mr. Wiechman that CPI intended to pay or had paid the subrogation demand. *Defendant's Exhs. H, I, J, K, L, M, N, P.* There is no letter at all inquiring as to whether Mr. Wiechman or plaintiff objects to CPI paying the subrogation demand. *Defendant's Exhs. H, I, J, K, L, M, N, P.*

32. Controverted. The letter does not “acknowledge” the conversation. *Defendant's Exh. C*, p. 44; *Plaintiff's Exhibit 36*, p. 59/15-19; p. 60/2-5. Rather, the letter purports to be “a follow-up to our conversation” *Defendant's Exh. R.*

33. Controverted. On or about February 1, 2008, plaintiffs “Confidential Settlement Brochure” made a demand to settle for \$85,263.88. *Plaintiffs Exhibit 6*, ¶10; *Exhibit 11*, p. § VI; *Exhibits 1-3*, ¶8; *Exhibit 4*, ¶8. CPI received the settlement demand. *Plaintiff's Exhibits 1-3*, ¶¶ 9-10; *Exhibit 4*, ¶¶9-10; *Exhibit 8*, p. 37; *Exhibit 12.* Avery's letter of March 12, 2008, says CPI would “issue payment in the amount of \$25,000” and consider the matter closed upon receipt of the enclosed Release of All Claims. *Plaintiff's Exhibit 14.* The Release of All Claims promised that payment of \$25,000 “will be forthcoming.” *Plaintiff's Exhibit 14.*

34. Uncontroverted.

35. Controverted. The evidence of record shows an entry in the Claims Activity Record for October 16, 2008, of a telephone call from Mr. Wiechman to Avery during which Avery conceded State Farm possessed no PIP lien because its payments were not duplicative of the settlement amount: “there was no lien when there were duplicative pymts. Explained we are aware of this ...” *Defendant's Exh. C*, p. 45.

36. Uncontroverted.

37. Controverted. The referenced evidence does not support the contention. Also, the evidence of record shows that, on February 25, 2009, Avery called for Mr. Wiechman's federal tax identification number, and Mr. Wiechman informed her that he was filing suit against the insurance company for failing to honor the agreement. *Defendant's Exh. C*, p. 46.

38. Controverted. The referenced evidence does not support the contention. The referenced evidence shows that, when asked if Gragson saw in the file any explanation for the delay between October 16, 2008, and March 2013, for the lawsuit Mr. Wiechman said he would file against Benchmark, Gragson pointed to the promise to pay \$25,000, “and he was going to sue us if we didn't pay it.” *Defendant's Exh. S*, p. 193/13-22. The examination then transitioned to communications occurring “thereafter” without specifying what he was talking about. *Id.* at 193/24-25. Rather than ask a question, defendants' attorney claimed there was “no explanation of why he waited ... four and a half years,” to which Gragson disagreed saying “[n]o, no. No sir.” *Id.* at 194/5-8.

Also, defendants have withheld pages 53-54 of the Claim Activity Report. *Defendant's Cos. Exh. C*. Those pages may include an explanation.

39. Uncontroverted for purposes of the motion only.

40. Uncontroverted.

41. Uncontroverted.

42. Uncontroverted.

43. Uncontroverted.

44. Uncontroverted.

45. Uncontroverted.

46. Uncontroverted.

47. Uncontroverted.

48. Uncontroverted.

49. Uncontroverted.

50. Controverted. The referenced evidence does not support the contention. Nowhere in the referenced evidence is plaintiff asked about a “lien” of State Farm.

51. Uncontroverted.

52. Controverted. The referenced evidence does not support the contention. The referenced evidence shows that, after August 26, 2008, “[a]fter they agreed for the 25,000, and then they had said that they were only going to pay us 17,” plaintiff and his attorney “spoke about that.” *Defendant's Exh. T*, p. 52/1-15. Plaintiff learned the insurance company paid \$7,153 several months earlier to State Farm. *Id.* at 52/22-25.

53. Uncontroverted.

54. Uncontroverted.

55. Uncontroverted.

56. Controverted. The referenced evidence does not support the contention. The referenced evidence is that, between September 16, 2008, and March 8, 2013, plaintiff asked his attorney “what was going on with” plaintiff's lawsuit. *Defendant's Exh. T*, p. 60/20-25. The testimony does not indicate whether the “lawsuit” to which plaintiff referred was the dismissal of plaintiff's personal injury lawsuit or plaintiff's prospective breach of the settlement agreement lawsuit, or if plaintiff thought both claims were in a single lawsuit. *Id.*

The referenced evidence shows that, from December 2008 to March 2013, plaintiff was communicating with his uncle about every three months. *Defendant's Exh. T*, p. 61/7 — 62/1. The referenced evidence does not show the subject matter of his conversations, and does not show that the subject matter was “about what was happening in the tort case.”

57. Uncontroverted.

58. Uncontroverted.

59. Uncontroverted.

60 Controverted, The referenced evidence does not support the contention. The referenced evidence of Mr. Wiechman's testimony is as follows:

- a. it is false and misleading to say that the law required an insured of State Farm to reimburse them the PIP if recovered in a tort case; and,
- b. you only have to pay PIP back if what you received in PIP is duplicative of what you received from the defendant; in other words, State Farm may not have any lien whatsoever against plaintiff if what he received is not duplicative.

Defendant's Exh. Y (Robert D. Wiechman Deposition Transcript).⁴ p. 19/8-20.

Also, Exhibit CC accompanying the Second Amended Motion For Summary Judgment of the Insurance Companies is a letter from State Farm to plaintiff, dated July 11, 2006, in which State Farm acknowledges that it is entitled to reimbursement from funds collected from the responsible party “provided they are duplicative of our P!P benefits.” *Ins, Cos. Exh. CC*.

61. Uncontroverted.

62. Uncontroverted.

63. Uncontroverted.

64. Uncontroverted.

65. Controverted. The referenced evidence does not support the contention. The referenced evidence is that Mr. Wiechman never inquired of defendant CPI as to payments they made to anybody else. *Defendant's Exh. Y*, p. 22/20-22.

66. Uncontroverted.

67. Uncontroverted.

68. Uncontroverted.

69. Uncontroverted.

70. Controverted. The referenced evidence does not support the contention. The referenced evidence is that Mr. Wiechman would assume the letter of July 20, 2006, indicated to him that State Farm had paid PIP in that amount. *Defendant's Exh. Y*, p. 28/11-13.

71. Uncontroverted.

72. Uncontroverted.

73. Controverted. The referenced evidence does not support the contention. The referenced evidence is that Mr. Wiechman and State Farm never talked about any PIP payments, offsets or any other type of payment made by State Farm. *Defendant's Exh. Y*, pp. 33/23 — 34/7.

74. Uncontroverted.

75. Uncontroverted.

76. Uncontroverted.

77. Controverted. The referenced evidence does not support the contention. The referenced evidence is as follows:

a. the letter of March 12, 2008, references a telephone conversation Avery had with Mr. Wiechman occurring either March 11 or 12, 2008;

b. Mr. Wiechman recalls the content of that conversation; and

c. Avery called and “said they were going to offer \$25,000 to my client and would send a release which he needed to sign and send back to them, and the case would be over.”

Defendant's Exh. Y, p. 41/7-24.

The evidence of record shows that, in her letter of October 2, 2008, Avery admitted that “[w]e extended an offer to you for your client on March 12, 2008. ...” *Defendant's Exh. R*. That letter mentions nothing about a verbal offer to pay only \$7,135.15, or a verbal agreement to pay only \$7,135.15.

78. Controverted. The evidence of record shows that, between March 12, 2008, and August 26, 2008, there were communications between Wiechman and Avery. On May 6, 2008, Avery faxed to Mr. Wiechman the identical letter of March 12, 2008, and the identical Release of All Claims. *Plaintiff's Exhibit 15*. ‘it mentioned nothing about a verbal offer to pay only \$7,135.15,

or a verbal agreement to pay only \$7,135.15. *Id.* Again, on June 3, 2008, Avery faxed to Mr. Wiechman the identical letter of March 12, 2008, and the identical Release of All Claims, *Plaintiff's Exhibit* 16. It mentioned nothing about a verbal offer to pay only \$7,135.15, or a verbal agreement to pay only \$7,135.15. *Id.*

79. Controverted. The referenced evidence does not support the contention. The referenced evidence is as follows:

- a. the telephone conversation of March 11 or 12 was not the first time Mr. Wiechman had spoken to Avery;
- b. he spoke with her on February 13, 2008;
- c. he thinks there was one other phone conference maybe the end of 2007 after the lawsuit was filed, but he is not real clear on that one; and
- d. he tried to call Avery on December 20, 2007, but did not get her on the phone.

Defendant's Exh. Y, p. 42/8 - 43/10.

80. Controverted. The referenced evidence does not support the contention. The referenced evidence is as follows:

- a. the conversation on February 13, 2008, was about the settlement demand Avery had received;
- b. Avery wanted current photographs of plaintiffs face;
- c. Avery wanted to avoid litigation and avoid legal expenses and did not want to hire an attorney to represent Huddleston; and
- d. Avery wanted to try to see if the claim could be settled without litigation. legal expenses and hiring any attorney to represent Huddleston.

Defendant's Exh. Y, p. 42/8-23.

Also, Mr. Wiechman said he would give her "some time to see if we could get it settled." *Defendant's Exh. Y*, pp. 42/24 — 43/1.

81. Controverted. Mr. Wiechman told defendant CPI (for the second time) that he represented plaintiff. *Defendant's Exh. O* (second page) ("Robert D. Wiechman, Jr. Attorney for Byron T. Wiechman."). Also, in his letter of August 11, 2006, Mr. Wiechman informed CPI that he represented Byron Wiechman. *Defendant's Exh. J* ("My Client Byron Wiechman"). Entries in defendants' Claim Activity Record repeatedly refer to Mr. Wiechman as the claimant's attorney. *See e.g., Defendant's Exh. C*, p. 36 (12/27/07 "Call clmnt's atty"); p. 35 (10/26/07 "clmt has an atty"); p. 34 (10/25/07 "Clmt represented by atty"); p. 33 (10/25/07 "Called clmt's atty 316-264-2155. Mr. Wiechman was no court.").

82. Controverted. The referenced evidence does not support the contention. The referenced evidence is that, with respect to two letters, Mr. Wiechman testified "I don't think I received them in this form" and "I don't recall receiving them in that form. Doesn't have my address on there and I — I can't testify that I actually received those two letters" and "I don't really recall getting any of those letters." *Defendant's Exh. Y*, p. 45/14 — 46/25.

With respect to a third letter, the reference evidence is that Mr. Wiechman does not recall receiving it. *Defendant's Exh. Y*, p. 47/1-17.

The referenced evidence does not support the contention of a fourth letter. *Defendant's Exh. Y*, pp. 44/17-47/17.

83. Controverted. The referenced evidence does not support the contention. The referenced evidence is that, from August through December, other than the August 11 letter, Mr. Wiechman did not have communications with defendant CPI. *Defendant's Exh. Y*, p. 48/3-6.

84. Controverted. The referenced evidence does not support the contention. The referenced evidence is as follows:

a. from August through December, other than the August 11 letter, Mr. Wiechman did not have any communications with defendant CPI, *Defendant's Exh. Y*, p. 48/3-6, and

b. some unidentified document reflects a phone call from Avery to his office voicemail on October 25, 2007, and according to the document, the call was not returned, *Defendant's Exh. Y*, p. 49/14-20.

85. Uncontroverted.

86. Controverted. The referenced evidence does not support the contention. The referenced evidence is as follows:

a. Mr. Wiechman's letter to State Farm of July 21, 2008, made no mention of PIP because it was not relevant, plaintiff had no intention of paying any PIP back, *Defendant's Exh. Y*, p. 52/1-13, and

b. Mr. Wiechman is aware that the settlement brochure included medical bills for plaintiff arising out of the accident indicating payment by State Farm. *Id.* at 52/14-19.

87. Controverted. The referenced evidence does not support the contention. The referenced evidence is as follows:

a. there was never any discussion between Avery and Mr. Wiechman about PIP payments, *Defendant's Exh. Y*, p. 52/12-17, and

b. the first time Mr. Wiechman heard from defendants CPI or Benchmark that CPI had reimbursed State Farm was in October 2008, *Id.* at 55/3-10.

88. Uncontroverted.

89. Uncontroverted.

90. Controverted. The referenced evidence does not support the contention. The referenced evidence is that, when he moved his office, he could not leave a forwarding address because there were four attorneys in his former building and he couldn't file a change-of-address with the post-office because it would have changed the address for all four attorneys, and they wouldn't let Mr. Wiechman do that. *Defendant's Exh. Y*, p. 58/3-9. Mr. Wiechman did not care about receiving anything from CPI because he was going to sue CPI, which he had already told them he was going to do, so there was no reason to talk anymore. *Id.* at 58/10-14.

91. Controverted. The referenced evidence does not support the contention. Plaintiff incorporates by reference the contents of paragraphs 88 above.

92. Uncontroverted,

93. Controverted. The referenced evidence does not support the contention. The referenced evidence is as follows:

a. that Mr. Wiechman does not "now" know where Avery is, *Defendant's Exh. Y*, p.61/17-18,⁵

b. that “we’re waiting on you to tell us where she’s at or to provide us with documents that haven’t been redacted that might help us in locating her” and “I’m sure there’s somebody at CPI that knows where she’s at,” *Id.* at 61/19-24,

c. that Mr. Wiechman had made effort to locate her by asking Hummer “to provide her address and whereabouts and her information,” and Hummer said he is “working on it,” *Id.* at 61/25 - 62/3, and

d. that, on June 24, 2013, Mr. Wiechman worked on trying to find Avery and has not yet found her, *Id.* at 62/4-11.

94. Controverted. The referenced evidence does not support the contention. The referenced evidence does not show that Mr. Wiechman “first realized CPI was not going to pay” \$25,000 to plaintiff “when he read the transcribed voice mail message. *Defendant’s Exh. Y*, pp. 64/17 - 65/17. The record evidence shows that Mr. Wiechman learned for the first time that CPI was not going to pay \$25,000 after sending the Release to defendant CPI on August 26, 2008. *Id.* at 63/19 - 64/2. He may have learned it in September 2008. *Id.* at 64/3-4. It may have been October 2008. *Id.* at 64/5-14.

95. Controverted. The referenced evidence does not support the contention. The referenced evidence is that “if there’s no date there, then its more likely than not that I did not return that call on that day.” *Defendant’s Exh. Y*, p. 65/8-17 (underlining added).

96. Uncontroverted.

97. Controverted. The referenced evidence does not support the contention. The referenced evidence is as follows:

a. Mr. Wiechman thinks defendants’ claim activity report contains an entry on October 1, 2008, stating that Avery spoke with Mr. Wiechman on September 26, 2008, and Mr. Wiechman remembers talking to her, *Defendant’s Exh. Y*, p. 66/18-25;

b. Mr. Wiechman has no notes of that conversation, *Id.* at p. 67/1-2; and

c. the conversation was a disagreement about how much was to be paid and Mr. Wiechman threatened to sue the insurance company, *Id.* at p. 67/3-8.

98. Controverted. The referenced evidence does not support the contention. The referenced evidence is as follows:

a. that Mr. Wiechman did not have to convey to defendants Benchmark or CPI any objection to them reimbursing State Farm’s PIP payments. *Ins. Cos. Exh. Y*, p. 67/14-18; and

b. that Mr. Wiechman was relying on CPI’s letter of July 20, 2006, “where they said they couldn’t pay it until they received stuff from me, so I was under the assumption that they weren’t going to pay anything until heard from me and got medical bills and records from me,” which did not happen until February 2008, *Id.* at 67/18 68/1.

Also, the evidence of record shows that, in there letters to plaintiff of June 20, 2006, and July 20, 2006, CPI represented that “[w]e are unable to consider reimbursement [to State Farm] unless we have all of the medical records and bills to support their claim.” *Defendant’s Exhs. H and 1 Plaintiffs Exhibit 37*, ¶4. Defendants never informed Mr. Wiechman of the falsity of their written representation. *Plaintiff’s Exhibit 37*, ¶4. Relying on that representation, Mr. Wiechman withheld from CPI the medical records and bills. *Id.* Nevertheless, and contrary to their written representation, on March 14, 2007, less than 18 months after the date of the accident, CPI reimbursed State Farm. *Id.* Prior to September 2008, Mr. Wiechman did not know that CPI intended to pay or had paid the subrogation demand of State Farm *Id.*

The letters from CPI to Mr. Wiechman, sent after CPI paid State Farm’s subrogation demand, and prior to August 26, 2008, conceal the fact that CPI had paid the subrogation demand. *Plaintiff’s Exhibits 12, 14, 15, 16.*

There is no entry in the Claim Activity Report preceding September 2008 of defendants telling plaintiff or Mr. Wiechman that CPI intended to pay or had paid the subrogation demand. *Defendant's Exh. C*. There is no letter preceding September 2008 of defendants telling plaintiff or Mr. Wiechman that CPI intended to pay or had paid the subrogation demand. *Defendant v Exhs. H, I, J, K, L, M, N, P*. There is no letter at all inquiring as to whether Mr. Wiechman or plaintiff objects to CPI paying the subrogation demand. *Defendant's Exhs. H, I, J, K, L, M, N, P*.

99. Uncontroverted.

100. Uncontroverted.

101. Uncontroverted.

102. Uncontroverted.

103. Uncontroverted.

104. Uncontroverted.

105. Uncontroverted.

106. Controverted. The referenced evidence does not support the contention. The referenced evidence is as follows;

- a. after the August 15, 2008, letter from Judge Fleetwood, Mr. Wiechman did not do anything to follow up to see that the personal injury lawsuit was not dismissed “because we settled the case on August 26th of #08,” *Defendant's Exh. Y*, p. 71/3-7;
- b. Mr. Wiechman did not believe the case was not settled, *Id.* at 71/8-12;
- c. Mr. Wiechman knew the case was settled for \$25,000, *Id.* at 71/12-16;
- d. in October 2008, Mr. Wiechman knew defendant CPI was saying they were not paying \$25,000 because of the prior PIP reimbursement to State Farm, and he understood CPI was not willing to pay \$25,000, and “1 thought we had a difference of opinion as to the interpretation of the release,” *Id.* at 71/17 — 72/6; and
- e. Mr. Wiechman did not do anything to prevent dismissal of the Personal Injury Lawsuit because he did not have to because there was a settlement with defendants, *Id.* at 72/7-17.

107. Controverted. The referenced evidence does not support the contention. The referenced evidence is as follows:

- a. on September 26, 2008, and again in October 2008, Mr. Wiechman told Avery he was going to sue the insurance company, *Defendant's Exh. Y*, p. 73/12-17;
- b. there was a possibility that Mr. Wiechman may be a witness in the case and his attorney of choice and plaintiff's attorney of choice was Ron Beal, who was involved in a major malpractice lawsuit against a Kansas City law Firm in Butler County, *Id.* at 73/18-74/6, 74/10-11;
- c. Mr. Beal informed Mr. Wiechman that he was unable to take this case, and it was not until March 2013 that he was free to take this case, *Id.* at 74/6-9.

108. Controverted. The evidence of record shows that, from September 26, 2008, over the next couple of years, Mr. Wiechman was not familiar with any Wichita lawyers he believed were capable of filing suit against CPI and Benchmark to the extent that Mr. Beal would be in representing plaintiff. *Defendant's Exh. Y*, p. 74/12-18.

Also, the referenced evidence does not support the contention. The referenced evidence is as follows:

a. there were no lawyers in Wichita during the two years after September 2008 that Mr. Wiechman felt were capable of filing and pursuing competently a contract action against the defendants to the extent that Mr. Beal is capable and competent, *Defendant's Exh. Y*, p. 75/17-23.

b. the preference of Mr. Wiechman “was to have Mr. Beal and Mr. Beal alone do this, absolutely.” *Id.* at 75/24 - 76/3.

109. Controverted. The referenced evidence does not support the contention. The referenced evidence is as follows:

a. Mr. Wiechman did not file this action prior to March 2013 because Mr. Beal was not available, *Defendant's Exh. Y*, p. 76/4-9;

b. Mr. Wiechman did not file this action within a couple of years post-September 2008 because he knew he had to get Mr. Beal involved shortly after filing, and Mr. Beal was not available, *Id.* at 76/10-21.

110. Uncontroverted.

111. Uncontroverted.

112. Uncontroverted.

113. Uncontroverted.

114. Controverted. The referenced evidence does not support the contention that there was a PIP “lien,” and does not support the contention that Mr. Wiechman “acknowledged knowing of the PIP lien.” The referenced evidence is that Mr. Wiechman acknowledged “the PIP *payments* made in this case” by State Farm. *Defendant's Exh. J* (underlining added).

The record evidence shows State Farm possessed no PIP lien; that plaintiff's damages (\$85,000+) equals or exceeds the liability coverage (\$25,000) plus the amount of PIP benefits paid by State Farm (\$7,135.15), meaning there was no double recovery. *Defendant's Exh. Y*, p. 19/8-20; *Plaintiffs Exhibit 11*.

Also, Exhibit CC of the Insurance Companies is a letter from State Farm to plaintiff, dated July 11, 2006, in which State Farm acknowledges that it is entitled to reimbursement from funds collected from the responsible party “provided they are duplicative of our PIP benefits.” *Ins. Cos. Exh. CC*.

115. Uncontroverted.

116. Uncontroverted.

117. Uncontroverted.

118. Controverted. The referenced evidence does not support the implication of a connection between the alleged lack non-responses from Mr. Wiechman and defendant CPI's payment of the subrogation demand. *See also supra*, pp. 17-18, ¶98 (incorporated by reference).

119. Uncontroverted.

120. Controverted. The referenced evidence does not support the contention. Plaintiff is entitled to recover prejudgment interest on the amount due at the rate of ten percent (10%) per annum from August 27, 2008, to the date of judgment. *Amended Petition*, ¶14.

121. Controverted. Movants do not support their allegation. Movants have failed to comply with [Kan. Sup. Ct. Rule 141\(a\)\(2\)](#) requiring that the moving party provide “precise references to pages, lines and/or paragraphs ... of the portion of the record on which the movants relies ...”

SPECIFIC FACTS WHICH PRECLUDE SUMMARY JUDGMENT FOR DEFENDANT

Defendant failed to satisfy his initial burden of presenting evidence showing no genuine issue of material fact entitling him to judgment as a matter of law. For this reason alone, the Amended Motion should be denied.

Additionally, the Amended Motion should be denied because plaintiff has come forward with a mountain of evidence which supports plaintiff's breach of contract claim and refutes the defenses raised by defendant. The following are specific facts, supported by precise references to pages, lines and/or paragraphs of the record, which preclude summary judgment for the movant.

A. Evidence the Parties Agreed, In Writing, That \$25,000 Would Be Paid To Plaintiff.

1. The declarations page of the insurance policy covering defendant Huddleston and the accident states that defendant Benchmark Insurance will hire and pay a lawyer and pay all defense costs if the named insured or family member is sued for damages because of an auto accident. *Exhibit 5*, p. #2.

2. On September 27, 2007, plaintiff filed a lawsuit against defendant Huddleston (hereinafter “the Personal Injury Lawsuit”). *Exhibits 1-3*, ¶4; *Exhibit 4*, ¶4; *Exhibit 29*.

3. On October 9, 2007, defendant CPI contacted the Sedgwick County District Court and learned of the Personal Injury Lawsuit. *Exhibits 1-3*, ¶5; *Exhibit 4*, ¶5; *Exhibit 8*, p. 31.

4. On October 25, 2007, Mkhele Avery of defendant CPI called plaintiff's attorney, Robert D. Wiechman, Jr., and left a voicemail message saying she had taken over handling the claim, and requested that Mr. Wiechman contact her *in order to try and move the matter towards conclusion without incurring additional legal expenses*. *Exhibits 1-3*, ¶6; *Exhibit 4*, ¶6; *Exhibit 8*, p. 33; *Exhibit 9*; *Exhibit 6*, ¶8.

5. In a letter from Avery to Mr. Wiechman, dated October 25, 2007, Avery states “[w]e have been trying to reach you regarding *moving this matter towards resolution*.” *Exhibit 10* (underlining supplied.). *Exhibit 10*; *Exhibits 1-3*, ¶7; *Exhibit 4*, ¶7; *Exhibit 6*, ¶9. On February 13, 2008, Avery told Mr. Wiechman that she would like to settle without hiring an attorney, and that they wanted to avoid legal expenses. *Exhibit 36*, p. 88/17-20.

6. On or about February 1, 2008, plaintiff's “Confidential Settlement Brochure” made a settlement demand in the amount of \$85,263.88. *Exhibit 6*, ¶10; *Exhibit 11*, p. § VI; *Exhibits 1-3*, ¶8; *Exhibit 4*, ¶8. CPI received the settlement demand. *Exhibits 1-3*, ¶¶9-10; *Exhibit 4*, ¶¶9-10; *Exhibit 8*, p. 37; *Exhibit 12*.

7. Leonard Gragson (“Gragson”) testified that, other than conversation with counsel, he has no recollection of his involvement in plaintiff's claim independent of what the Claim Activity Report says. *Exhibit 13*, pp. 36/24 - 37/5. When asked if he remembers

anything about plaintiff's claim which is not recorded in the Activity Report, Gragson testified "[no], I really don't, outside of conversations I've had with our attorney." *Exhibit 13*, p. 37/8-12.

8. On March 12, 2008, defendant CPI, on behalf of defendant Benchmark Insurance and defendant Huddleston, made a settlement offer to Robert (Rocky) D. Wiechman, Jr. plaintiffs attorney, as set forth in the letter dated March 32, 2008. *Exhibit 14*; *Exhibits 1-3*, ¶¶12-14, ¶16; *Exhibit 4*, ¶¶12-14, ¶16; *Exhibit 36*, p. 86/1-11.

9. The letter states that a Release of All Claims was enclosed, and that CPI would issue payment in the amount of \$25,000 and consider the matter closed upon receipt of the enclosed Release of All Claims:

This is a follow-up to our phone message today wherein we agreed to extend out insured's policy limit of \$25,000.00 to you on behalf of your client. We have enclosed a Release of All Claims.

Upon receipt of the properly executed release, we will issue payment in the amount of \$25,000.00 and consider the matter resolved.

Exhibit 14.

10. Accompanying Avery's letter of March 12, 2008. was a release titled "Release of all Claims" prepared by CPI for the signature of plaintiff. *Exhibit 14*; *Exhibits 1-3*, ¶17; *Exhibit 4*, ¶17; *Exhibit 14*; *Exhibit 6*, ¶12; *Exhibit 13*, pp. 127/12-16. The Release of All Claims was the standard form used by CPI both before and after use in this matter. *Exhibit 13*, pp. 126/20 — 127/16. There was no agreement prior to March 12, 2008. *Exhibit 6*, ¶12.

11. The Release of All Claims promised the undersigned consideration of \$25,000 to the undersigned, with payment forthcoming, for releasing defendant Huddleston and others:

"[T]he Undersigned, being of lawful age, for the sole consideration Twenty Five Thousand - 00/-100 (\$25,000.00) to the undersigned (payment will be forthcoming) ... release, acquit and forever discharge Iris Smith, Mark Huddleston ..."

Exhibit 14. The payment provision clearly and unambiguously promises "Twenty Five Thousand —00-100 (\$25,000.00) to the undersigned (payment will be forthcoming)." *Id.*

12. The Release states "this settlement is the compromise of a doubtful and disputed claim." *Exhibit 14.*

13. The Release states that defendants deny liability and "intend merely to avoid litigation and be at their peace." *Exhibit 14.*

14. The Release includes an integration clause stating it "contains the entire agreement. ..." *Exhibit 14.*

15. The Release states its terms are "contractual" and not a mere recital *Exhibit 14.*

16. In the Claim Activity Report, Avery made a record of her telephone conversation with Mr. Wiechman held on March 11, 2008. *Exhibit 8*, p. 39. The report shows Avery did not offer \$17,864.85, and shows Mr. Wiechman did not accept \$17,864.85. *Id.* The report contains no entry whatsoever of an offer of \$17,864.85, and contains no entry whatsoever of plaintiff accepting an offer of \$17,864.85. *Id.*

17. It is uncontroverted the Claim Activity Report "contains anything that transpired in the course of the claim, a running time line of everything done in the claims system including ... conversations the adjuster conducts with anyone related to the claim handling." *Amended Motion*, p. 4, ¶7; *supra*, p. 4, ¶7.

18. The Claim Activity Report shows it was not until the following day — March 12, 2008 - that Avery spoke with and received from Gragson approval to settle. *Exhibit 8*, p. 39.

19. That same day, on March 12, 2008, Avery sent her letter promising to “issue payment in the amount of \$25,000” upon receipt of the signed release. *Exhibit 14*. This passage clearly and expressly states that the payment amount to be issued was \$25,000. *Id.* She did not say “we will issue payment in the amount of \$25,000 less \$7,135.15.” *Id.*

20. Accompanying Avery's letter of March 12, 2008, was the proposed Release. *Exhibit 14*. It promised payment of \$25,000 “will be forthcoming.” *Id.* This passage clearly and expressly states that the payment term was \$25,000. *Id.* The Release does not say \$17,864.85 “will be forthcoming.” *Id.* Also, the Release states that it is contractual, and not a mere recital. *Id.*

21. On February 26, 2009, defendants' attorney admitted that defendant CPI “made a settlement offer to [Mr. Wiechman] for its policy limit of \$25,000 *without mention of the deduction for PIP paid.*” *Plaintiff's Exhibit 26*.

22. In a fax on May 6, 2008, defendants repeated their offer to pay \$25,000 to plaintiff, faxing the identical March 12 letter and Release to plaintiff's attorney. *Exhibit 15*. The fax says nothing about a supposed verbal agreement. *Id.*

23. In a fax on June 3, 2008, defendants re-repeated their offer, faxing the identical March 12 letter and Release to plaintiff's attorney. *Exhibit 16*. The fax says nothing about a supposed verbal agreement. *Id.*

24. On July 21, 2008, in a letter to State Farm Insurance Company, plaintiff's underinsurance carrier, Mr. Wiechman enclosed the letter from Avery, dated March 12, 2008, which states that CPI is extending a policy limits offer of \$25,000.00 in exchange for a full and complete release. *Exhibit 17*; *Exhibit 6*, ¶14.

25. In early August 2008, plaintiff and his attorney settled the underinsured claim which plaintiff possessed against State Farm, and received payment in the amount of \$25,000. *Exhibits 18-20*; *Exhibit 6*, ¶15.

26. On August 6, 2008, plaintiff signed the Release of All Claims. *Exhibit 21*; *Exhibit 6*, ¶16. On August 26, 2008, plaintiff's attorney faxed and mailed the signed Release of All Claims to defendant CPI. *Exhibit 22*; *Exhibit 6*, ¶16.

27. On August 26, 2008, defendant CPI received the signed Release of All Claims which had been faxed to it. *Exhibit 23*; *Exhibit 13*, pp. 137/4 - 138/17; 140/14 — 141/4; *Exhibits 1-3*, ¶¶20-23; *Exhibit 4*, ¶¶20-23.

28. Avery made an entry in CPI's Claim Activity Report for August 27, 2013, which says “Rec'd Properly signed Release of All Claims from clmt's atty” and “Will issue pymt” and “This matter has settled.” *Exhibit 8*, p. 42,

29. On August 28, 2008, defendant CPI received the signed Release of All Claims which had been mailed to it. *Exhibit 24*; *Exhibit 13*, pp. 142/2 — 143/4.

30. On March 17, 2009, defendants' attorney admitted plaintiff had accepted defendants' offer *in August 2008*: “about five months later (August 26) you accept that offer.” *Exhibits 26-27*; *Exhibits 1-3*, ¶¶26-27; *Exhibit 4*, ¶26-27. Defendants' attorney made no mention of, and did not claim there was, a verbal agreement preceding August 26, 2008. *Exhibits 27*.

31. After plaintiff refused to accept a substitute payment of \$17,263.88, defendants closed their file and kept the Release. *Exhibit 6*, ¶22; *Exhibit 8*, p. 48; *Exhibit 25*.

32. Prior to September 2008, neither plaintiff nor his attorney believed or was aware that defendants supposedly believed the settlement amount was \$17,846.85. *Exhibit 6*, ¶17,

33. On October 1, 2008, in an entry in the Claim Activity Report following a meeting with Gragson, Avery states that “[t]he release in essence is correct.” *Exhibit 8*, p. 44. In her letter of October 2, 2008, Avery stated “[w]e extended an *offer* to you for your client on March 12, 2008” *Defendants' Exh. R*. She mentions nothing about a supposed verbal offer to pay \$17,864.85, or a supposed verbal agreement to pay \$17,864.85. *Id.*

34. In a letter from Avery, dated January 22, 2009, Avery wrote that “[t]his letter is a follow-up to our offer and your acceptance of our offer.” *Exhibit 25*. Avery does not say there was a verbal offer to pay only \$17,864.85, or a verbal agreement to pay only \$17,864.85. *Exhibit 25*.

35. Also, in her letter of January 22, 2009, Avery used the phrase “the remaining balance of our insured's policy limit” to mean “\$17,846.85.” *Exhibit 25*. In their Claim Activity Report on May 14, 2012, defendants used the phrase “inclusive of a PIP lien” to mean “\$17,846.85.” *Exhibit 8*, p. 49. In answer to interrogatories, defendants used the phrase “policy limit remaining at the time of the conclusion of the claim” to mean “\$17,846.85.” *Exhibit 33*, p. 2 (second to last line).

36. Neither Avery's letter of March 12, 2008, nor the Release use “the remaining balance of our insured's policy limit” or “inclusive of a PIP lien” or “policy limit remaining at the time of the conclusion of the claim” or any such similar verbiage indicating that the payment amount would be \$17,864.85 instead of \$25,000. *Exhibit 14*.

37. None of Avery's letters say there was a verbal offer or an verbal agreement to pay only \$17,864.85 to plaintiff to settle. *Plaintiff's Exhibits 14, 15, 16, 25; Defendants' Exh. R*. Avery's letter of March 12, 2008, authored the day after the alleged verbal agreement, expressly offers to pay \$25,000 to plaintiff, not \$17,864.85. *Plaintiffs Exhibits 14*. Avery's faxes of May 6, 2008, and June 3, 2008, repeat and re-repeat the offer to pay \$25,000 to plaintiff. *Plaintiff's Exhibits 15, 16*. Neither her letter of October 2, 2008, nor her letter of January 22, 2009, contends there was a verbal agreement of any kind, much less one to pay only \$17,864.85. *Defendants' Exh. R; Plaintiff's Exhibits 25*.

38. Neither of the letters of defendants' attorney say there was a verbal agreement to pay \$17,864.85 to plaintiff to settle. *Plaintiffs Exhibits 26, 27*. On February 26, 2009, defendants' attorney admitted that defendant CPI “made a settlement offer to you for its policy limit of \$25,000 *without mention of the deduction for PIP paid.*” *Plaintiff's Exhibits 26*. He made no mention of, and did not claim there was, a verbal agreement preceding August 26, 2008, to pay only \$17,864.85. *Id.* On March 17, 2009, defendants' attorney admitted plaintiff had accepted defendants' offer: “[A]bout five months later (August 26) you accept that offer. *Plaintiff's Exhibits 27*. He made no mention of, and did not claim there was, a verbal agreement preceding August 26, 2008. *Id.* He did not claim Mr. Wiechman had accepted a verbal offer in March 2008. *Id.*

39. In their joint answer, defendants alleged plaintiff's claim is barred by the three- year statute of limitations. *Defendants' Joint Answer* ¶7. In interrogatories, defendants were asked to “[f]ully disclose all information on which you rely or which you consider significant for contending that the applicable statute of limitations is three years.” *Exhibits 30-32*, No. 9. Defendants asserted the contract “did not contain all the material terms,” but they did not disclose a single term not in writing, and they did not disclose their contention of a verbal agreement to pay \$17,864.85 to plaintiff. *Plaintiffs Exhibit 33*, No. 9.

B. Evidence of the Absence of the Essential Elements of Laches

40. The issue of whether laches does or does not apply in this case, given that a statute of limitations applies, has already been raised and decided by Judge Timothy Lahey. *Plaintiff's Exhibits 44-46*. In connection with a motion to quash a deposition subpoena in which plaintiff sought to bar defendants' attorney from taking the deposition of plaintiff's attorney, Ron D. Beal, defendants' attorney argued that information possessed by plaintiff's attorney was relevant to their affirmative defense of laches. *Plaintiffs Exhibit 44*, pp. 5-6. Plaintiff argued that, under Kansas law, because a statute of limitations applied to his claim, laches had no application. *Plaintiffs Exhibit 45*, pp. 7-8. Plaintiff said as follows:

Defendants explain that the information sought is relevant to their affirmative defense of laches. *Defendants' Response*, pp. 5-6. That explanation proves that the information is not relevant. As a matter of law, laches has no application to plaintiffs contract claim... Under Kansas law, when a statute has fixed a limitations period under which the claim would be barred if interposed in a court of law, courts follow the limitations provided by law and laches has no application. *Jennings v. Jennings*, 211 Kan. 515, 527, 507 P.2d 241 (1973); *Yeager v. National Cooperative Refinery Ass'n*, 205 Kan. 504, 509, 470 P.2d 797 (1970)(doctrine of laches has no relevance where 2-year statute of limitations applies).

Plaintiff's Exhibit 45, pp. 7-8. *See also Plaintiff's Exhibit 45*, pp. 8-9.

41. Judge Lahey agreed with plaintiff's argument and granted the motion to quash the deposition subpoena:

The Court: Okay. Tell me what cases you have where a statute of limitations applies and laches [sic] was a successful defense? They've cited two cases where the court pretty clearly suggest you are not going to have a laches [sic] defense if you've got an applicable statute of limitations,

* * *

The Court: Well, tell me the sense it would make we have a statute of limitations and you want to raise a laches [sic] defense when the claim is brought within the statute of limitations? How does that make sense in the context of how the system is set up?

* * *

Mr. Hummer: ... They are contending the five year applies. If that five year applies we're contending that they are still barred by laches [sic].

The Court: Okay. I get that. I wanted to know what sense that makes. I don't understand the rationale why that would even make sense ...

* * *

The Court: All right.

I will order the subpoenas quashed pursuant to 60-245 C

* * *

I don't think the information is relevant because this case has an applicable statute of limitations. I'm not aware ... Of a case where laches [sic] was successfully argued or applied in a case where a statute of limitations has been established by the legislature as is the case here....

This is a contract case... And since laches [sic] is not relevant that information can't be crucial so I'm granting the motion for those reasons as well.

Plaintiff's Exhibit 46, pp. 12/14-19; 13/5-9; 13/25- 14/7; 17/17-19; 18/6-19.

42. Numerous entries in the Claim Activity Report show that, upon learning plaintiff would not be paid the full \$25,000 amount, Mr. Wiechman immediately asserted plaintiffs claim for breach of contract by threatening a lawsuit and demanding payment of \$25,000. The following are several examples of the entries:

- a. An entry on October 1, 2008, states that, on September 26, 2008, Mr. Wiechman demanded payment of \$25,000, and that he would “sue” if defendants failed to make payment.
- b. An entry on October 16, 2008, states that Mr. Wiechman, again, informed defendants that he would file a lawsuit.
- c. An entry on February 25, 2009, states that Mr. Wiechman, again, informed defendants that he was filing a lawsuit “for failing to honor our agreement.”

Plaintiffs Exhibit 8, pp. 44-46; *Plaintiffs Exhibit 6*, ¶¶19-21.

43. Thereafter, Mr. Wiechman continued his demands for payment of \$25,000:

- a. On May 11, 2012, Mr. Wiechman, again, made demand on defendants for payment of \$25,000.
- b. On June 6, 2012, Mr. Wiechman, again, made demand on defendants.
- c. On June 19, 2012, Mr. Wiechman, again, made demand on defendants for payment of \$25,000.

Plaintiffs Exhibit 8, pp. 48, 50; *Defendant's Exh. C*, pp. 48, 50-51.

44. By February 2009 (if not earlier), defendants had hired and were consulting with a lawyer. *Plaintiff's Exhibits 26-27*. Their lawyer authored letters on the threatened lawsuit. *Id.*

45. The defendants could have filed a lawsuit for rescission or reformation or declaratory judgment, but chose not to. They could have taken Avery's statement. They obviously spoke with Avery. It is likely Avery's recitation of what happened did not help defendants' legal position, so defendants chose not to record her statement. *Plaintiffs Exhibit 37*, ¶6.

46. Mr. Wiechman handled the personal injury claim and the settlement negotiations; he was likely to be a witness in this case, so he could not try the case for his client; and plaintiffs substitute attorney-of-choice, Mr. Ron D. Beal, with whom Mr. Wiechman has worked on many cases since the early 1990s, did not become available to represent plaintiff until the beginning of 2013, accounting for the filing of the action in early March 2013. *Plaintiff's Exhibit 37*, ¶7

47. From October 2007 to early 2013, Mr. Beal was involved in a \$34 million legal malpractice lawsuit filed in Butler County, Kansas, representing three former stockholders, directors and officers of a Kansas Corporation against a large Kansas City law firm and two of its lawyers. He did not become available to represent plaintiff until the beginning of 2013. *Plaintiffs Exhibit 6*, ¶23; *Plaintiffs Exhibit 37*, ¶8.

48. In this case, Judge Vining has already stated that “I consider quite clearly the choice of counsel as a paramount virtue of a litigant. It has to be given great weight.” *Plaintiffs Exhibit 47*, p. 47/21-23.

49. The Claim Activity Report contains no entry to the effect that defendants were misled by the lapse of time. *Defendant's Exhibit C*.

50. The Insurance Companies have had the use of the \$25,000 settlement amount for six years. Invested conservatively, such as a mutual fund or ETF which replicates the return on the S&P 500, the settlement amount would have increased by over \$13,685

from August 26, 2008, to July 11, 2014 (August 26, 2008 — 1,271.51 close; July 11, 2014 — 1,967.57 close; 54.74% gain). In contrast, from August 26, 2008, to August 11, 2011 (the date Avery left CPI), the settlement amount would have *decreased* by over \$ 1,945 (August 26, 2008 - 1,271.51 close; August 11, 2011 — 1,172.64 close; 7.786% loss). Even under a conservative investment, the lapse of time of which defendants complain accounts provided the Insurance Companies with a benefit of over \$15,630. *Plaintiff's Exhibit 37*, ¶9.

51. The Insurance Companies fudge the calculation of their monetary *detriment* caused by the lapse of time. First, only the amount in dispute — \$7,135.15 — should be used to determine the monetary detriment caused by the lapse of time. The Insurance Companies claim the settlement amount is \$17,864.85. Nevertheless, they withheld payment of the \$17,864.85 amount they claim was owed. Accrued interest on the \$17,864.85 amount was caused solely by the Insurance Companies' decision to withhold payment of the amount they claimed was owed. Second, the monetary detriment should be calculated from August 11, 2011 — the only date provided by the Insurance Companies as to when prejudice allegedly struck. Consequently, the monetary detriment is only \$2,141 (\$7,135.15 times 10% times three years (August 11, 2011, to August 11, 2014)). *Plaintiff's Exhibit 37*, ¶10.

52. The net monetary benefit from the lapse of time is over \$11,540 (\$13,685 less \$2,141). In other words, the lapse of time has provided the Insurance Companies with a windfall exceeding \$11,540. And that number continues to increase. *Plaintiff's Exhibit 37*, ¶11.

53. This helps explain why the lawyer for the Insurance Companies objected to a trial date in September 2014, and insisted on a trial date in 2015 — a curious objection from a proponent of the laches defense. This helps explain why the lawyer for the Insurance Companies told the Court his second amended motion for summary judgment would be filed in December 2013, but delayed filing it until June 2014, *Plaintiff's Exhibit 37*, ¶ 2.

54. Defendants located Avery in California, and, thereafter, defendants looked for Avery in Oklahoma and Missouri and avoided looking for her in California, preferring not to locate her at all. *See supra*, pp. 4-5, ¶11.

55. The expense of a round trip plane ticket on Southwest Airlines is less than \$500. *Plaintiffs Exhibit 37*, ¶13.

56. The contention in ¶21 of page 6 - that “[t]here was no objection from Plaintiff or his attorney to CPI paying State Farm's PIP subrogation demand” — is accurate. Defendants concealed from plaintiff and his attorney the intention of the Insurance Companies to make the payment, the fact the Insurance Companies had made payment, and the falsity of their representation on which Mr. Wiechman relied that “[w]e are unable to consider reimbursement [to State Farm] unless we have all of the medical records and bills to support their claim.” Plaintiff and his attorney did not learn of the payment until after August 2008; after the parties had entered into their settlement agreement. *See supra*, pp. 17-18, ¶98.

57. If Avery's letter of March 12, 2008, had offered only \$17,864.85, plaintiff would not have settled. *Plaintiff's Exhibit 36*, p. 83/8-15. There would have been no settlement because plaintiff would not have settled his \$85,000-5-claim for anything less than \$25,000. *Id.* at 83/16- 19. There would have been no settlement for anything less than \$25,000. *Id.* at 83/21 - 84/2.

ARGUMENTS AND AUTHORITIES

I. DEFENDANT IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE AFFIRMATIVE DEFENSE OF STATUTE OF LIMITATIONS

Defendant argues that plaintiffs written contract claim is barred by the three year statute of limitations. *Amended Motion*, pp. 24-27. Defendants pled the affirmative defense of statute of limitations. *Defendants' Joint Answer*, ¶7. The party asserting the affirmative defense of statute of limitations bears the burden of proving its applicability. *Admire Bank & Trust v. City of Emporia*, 250 Kan. 688, 693, 829 P.2d 578 (1992). *See State ex rel. Stovall v. Meneley*, 271 Kan. 355, 389, 22 P.3d 124 (2001)

(party asserting affirmative defense bears burden of proof). Under [K.S.A. 60-511\(1\)](#), a five year statute of limitation applies to “[a]n action upon any agreement, contract or promise in writing.” For a written agreement to fall within the 5-year statute of limitations, the material terms must be in writing. [Zenda Grain & Supply Co. v. Farmland Industries, Inc.](#), 20 Kan.App.2d 728, 744, 894 P.2d 881 (1995). Unlike the statute of frauds, *see* [K.S.A. 33-106](#) (“shall be in writing and signed by the party to be charged”), [K.S.A. 60-511\(1\)](#) imposes no requirement that the writing be signed by the party to be charged.

Defendant says the three year statute of limitations applies because Avery and Mr. Wiechman made an oral agreement under which the payment amount was \$17,864.85 *Amended Motion*, p. 24, Defendant conceals the telephone call or calls during which an alleged verbal agreement was made to pay only \$17,864.85. *Id.* at 24-27. Rather, he vaguely mentions calls “both before and after the March 12, 2008, letter” *Id.* at 24. He does this because his own evidence shows there was no verbal agreement.

For several reasons, defendant is not entitled to summary judgment on his affirmative defense of statute of limitations. In interrogatories, defendants were asked to “[f]ully disclose all information on which you rely or which you consider significant for contending that the applicable statute of limitations is three years.” Defendants did not disclose their contention that the agreed amount to be paid to plaintiff was verbal, not written. Accordingly, defendant's argument should be rejected for failure to comply with their discovery obligation, *Infra*, p. 35.

Additionally, for several reasons, defendant has failed to satisfy his initial burden of showing admissible evidence of the alleged verbal agreement. First, under Kansas law, a subsequent written agreement embodies all prior understandings and agreements. *See infra*, pp. 35-36. Second, under the parol evidence rule, evidence of an alleged verbal agreement preceding the written agreement is not admissible if it conflicts with or is inconsistent with the written agreement. Here, even if there was evidence of an alleged verbal agreement preceding August 26, 2008, to pay plaintiff only \$17,864.85 (which there is not), the evidence is not admissible because it conflicts with and is inconsistent with the written settlement agreement to pay \$25,000 to plaintiff. *See infra*, pp. 36-38. Third, the defendant has presented no evidence of an outward manifestation or expression of assent on the part of the plaintiff to accept payment of \$17,864.85 to settle his personal injury claim. To the contrary, defendant's evidence shows there was no offer to pay \$17,864.85 and no acceptance of any supposed offer to pay only \$17,864.85. *See infra*, pp. 38-44.

Finally, in addition to defendant's failure to satisfy his initial burden of showing admissible evidence of an agreement to pay only \$17,864.85 to plaintiff, he is not entitled to summary judgment on his affirmative defense of statute of limitations because plaintiff has come forward with a mountain of evidence showing that the payment term was in writing, and that the payment term was \$25,000, not \$17,864.85. *See infra*, p. 45.

A. The “Verbal Agreement” Contention Should Be Rejected Because It Was Not Disclosed In Response To Plaintiffs Interrogatories.

In interrogatories, defendants were asked to “[f]ully disclose all information on which you rely or which you consider significant for contending that the applicable statute of limitations is three years.” *Facts* ¶39. Defendants asserted the settlement agreement “did not contain all the material terms,” but they did not disclose a single term not in writing, and they did not disclose their contention of a verbal agreement to pay \$17,864.85 to plaintiff. *Id.*

The Court has discretion to exclude testimony from a witness who is not properly identified during discovery or in pretrial order. [West v. Martin](#), 11 Kan.App.2d 55, Syl. ¶1, 713 P.2d 957 (1986). It follows, then, that the Court has discretion to disregard a defense that was not properly disclosed in discovery. Otherwise, litigants would have every incentive to conceal their defenses and perpetuate discovery **abuse**. Accordingly, the Court should exercise its discretion and reject this defense for failure to comply with the discovery obligations.

B. Defendant Has Failed To Satisfy His Initial Burden of Showing Admissible Evidence of the Alleged Verbal Agreement.

1. Under Kansas law, a subsequent written agreement embodies all prior oral understandings and agreements.

Under Kansas law, “it is elementary that an oral agreement entered into prior to or contemporaneously with a written agreement is merged into the latter.” *Oaks v. Hill*, 182 Kan. 501, 503, 322 P.2d 814 (1958). See also *Brown v. Beckerdite*, 174 Kan. 153, Syl ¶1, 254 P.2d 308 (“When oral conversations or negotiations lead to the execution of a written contract, they are thereby merged into the written instrument, from which the terms of the contract are to be determined.”); *Frogge v. Belford*, 168 Kan. 74, 78, 211 P.2d 49 (1949)(same). The written agreement was entered on August 26, 2008. *Facts* ¶27. Under Kansas law, purported oral agreements preceding August 26, 2008, were merged into the written agreement. This point of law, in and of itself, rules out an alleged prior verbal agreement to pay only \$17,864.85.

2. Under the parol evidence rule, evidence of an alleged verbal agreement to pay plaintiff only \$17,864.85 is not admissible because it conflicts with and is inconsistent with the written settlement agreement to pay \$25,000 to plaintiff.

The “[p]arol evidence rule is [a] rule of substantive contract law, not a rule of evidence.” *Prophet v. Builders, Inc.*, 204 Kan. 268, 272, 462 P.2d 122 (1969). Under the parol evidence rule,⁶ “[w]hen a contract is complete, unambiguous, and free from uncertainty, parole evidence of prior or contemporaneous agreements or understandings *tending to vary the terms of the contract evidenced by the writing* is inadmissible.” *In re Estate of McLeish*, 49 Kan.App.2d 246, 256, 307 P.3d 221 (2013), quoting *Simon v. National Farmers Organization, Inc.*, 250 Kan. 676, 679-80, 829 P.2d 884 (1992).

“‘The practical justification for the rule lies in the stability that it gives to written contracts; for otherwise either party might avoid his obligation by testifying that a contemporaneous oral agreement released him from the duties that he had simultaneously assumed in writing.’ 4 Williston, Contracts. § 631. In other words, the parol evidence rule addresses the fact that ‘disappointed parties will have a great incentive to describe circumstances in ways that escape the explicit terms of their contracts.’ Fried, Contract as Promise (Cambridge: Harvard University Press, 1981) at 60.”

UAW-GM Human Resource Or. V. KSL Recreation Corp., 579 N.W.2d 411, 414 (Mich.App. 1998).

The Release includes an integration clause stating it “contains the entire agreement. ...” *Facts* ¶14. See *ARY Jewelers, LLC. v. Krigel*, 277 Kan. 464, 476-77, 85 P.3d 1151 (2004)(“Both the SPA and the consulting agreement contain integration clauses that provide they constitute the “entire agreement.”).⁷

The payment provision is clear and unambiguous. It clearly and unambiguously promises “Twenty Five Thousand — 00-100 (\$25,000.00) to the undersigned (payment will be forthcoming).” *Facts* ¶11. A natural and reasonable interpretation of the payment term is that \$25,000 would be paid to plaintiff, not \$17,864.85. The alleged prior verbal agreement to pay only \$17,864.85 to plaintiff “tends to vary the terms of the contract evidenced by” the Release which promises to pay \$25,000 to plaintiff.

The conditions for applying the parol evidence rule are met; testimony of an alleged verbal agreement to pay only \$17,864.85 to plaintiff is not admissible. Under Kansas law, purported oral agreements preceding August 26, 2008, are not admissible. This point of law, in and of itself, rules out the alleged prior verbal agreement to pay only \$17,864.85.

Terry Bivens, on which defendant relies (*Amended Motion*, p. 26), is inapposite. There, “the court cannot tell from the uncontroverted facts ... Whether this alleged oral agreement occurred before, after, or contemporaneously with the signing of

the” written agreement. *Amended Motion*, p. 26. Also, the oral agreement did not contradict the written agreement. *Id.* Here, the alleged verbal agreement was entered prior to August 26, 2008, and it would contradict the written agreement.

3. The evidence proffered by defendant shows there was no outward manifestation or expression of assent by plaintiff to accept a payment of only \$17,864.85 to settle his personal injury claims.

Even if parol evidence is considered, the evidence proffered by defendant shows there was no outward manifestation or expression of assent by plaintiff to accept a payment of only \$17,864.85 to settle instead of the \$25,000 amount offered. Under Kansas law, mutual assent or the “meeting of the minds” consists of *mutual* expressions, not harmonious intentions or states of mind, and depends on the outward manifestations or expressions of assent of the parties. Whether the parties agreed to pay plaintiff \$17,864.85 depends on the outward manifestations or expressions of assent of the parties, not on their states of minds:

In determining intent to form a contract, the test is objective rather than subjective, meaning that the relevant inquiry is the manifestation of the parties' intentions, rather than their actual but unstated and unwritten intentions. The inquiry will focus not on the question of whether the subjective minds of the parties have met, but on whether their outward expression of assent is sufficient to form a contract.

Southwest and Associates, Inc. v. Steven Enterprises, LLC, 32 K.A.2d 778, Syl. ¶2, 88 P.2d 1246 (2004). Highly respected treatises make the same point. For example, Professor Arthur L. Corbin explained it this way:

“Agreement consists of mutual expressions; it does not consist of harmonious intentions or states of mind. It may well be that intentions and states of mind are themselves nothing but chemical reactions or electrical discharges in some part of the nervous systems. It may be that some day we may be able to observe chemical processes and electrical discharges. At present, however, what we observe for judicial purposes is the conduct of the parties. We observe this conduct and we describe it as the expression of a state of mind. It is by the conduct of two parties, by their bodily manifestations, that we must determine the existence of what is called agreement.

1 Corbin, *Corbin on Contracts* § 1.9 (1993). See also P.U.C-Civil 3d § 124.04, quoting 1 Corbin on Contracts § 9 (1952) (“It is by the conduct of two parties, by their bodily manifestations, that we must determine the existence of what is called an agreement. This is what is meant by the anciently-honored term “meeting of the minds. This is what is meant by mutual assent”).

Put another way, “the inquiry will focus not on the question of whether the subjective minds of the parties have met, but on whether their outward expression of assent is sufficient to form a contract.” 1 *Williston on Contracts* § 4.1, p. 336 (4th ed. 2007). See 17A *Am.Jur.2d, Contracts* § 31 (The test is objective, rather than subjective, meaning that the relevant inquiry is the manifestation of a party's intention, rather than the actual or real intention.). “One method by which the intention to contract may be demonstrated is by the process of offer and acceptance. An offer has been described as a manifestation of willingness to enter into a bargain.” *Prince Enterprises, Inc. v. Griffith Oil Co.*, 8 K.A.2d 644, 649, 664 P.2d 877, rev. denied 133 Kan. 1092 (1983).

The extrinsic evidence proffered by the defendant shows there was no outward manifestation or expression of assent by the plaintiff to accept a payment of only \$17,864.85. In the Claim Activity Report, Avery made a record of her telephone conversation with Mr. Wiechman held on March 11, 2008. *Defendant's Exh. C*, p. 39. The report shows Avery did not offer \$17,864.85, and shows Mr. Wiechman did not accept \$17,864.85. *Id.* The report contains no entry whatsoever of an offer of \$17,864.85, and contains no entry whatsoever of plaintiff accepting an offer of \$17,864.85. *Id.* It is uncontroverted the report “contains anything that transpired in the course of the claim, a running time line of everything done in the claims system including ... conversations the adjuster conducts with anyone related to the claim handling,” *Amended Motion*, p. 4, ¶7 *supra*, p. 4, ¶7.

Moreover, the Claim Activity Report shows it was not until the following day - March 12, 2008 — that Avery spoke with and received from Gragson approval to settle. *Defendant's Exh. C*, p. 39. That same day, Avery sent her letter promising to

“issue payment in the amount of \$25,000” upon receipt of the signed release. *Defendant's Exh. P*. Having promised a payment of \$25,000 on March 12, 2008, it is not reasonable to believe that, prior thereto, plaintiff agreed to accept a payment of only \$17,864.85 to settle his personal injury claim. Having promised a payment of \$25,000 on March 12, 2008, it is not reasonable to believe Avery would honestly testify that, prior thereto, plaintiff agreed to accept a payment of only \$17,864.85 to settle his personal injury claim. This is particularly true because the Claim Activity Report contains no entry preceding August 26, 2008, referring to a verbal agreement to pay only \$17,864.85 to plaintiff, and because the Claim Activity Report shows that Avery did not receive settlement approval from Gragson until March 12. Avery would not have offered to pay \$25,000 to plaintiff on the 12th if, prior thereto, Mr. Wiechman had verbally accepted a verbal offer for only \$17,864.85.

Accompanying Avery's letter of March 12, 2008, was the proposed Release. *Defendant's Exh. P*. It promised payment of \$25,000 “will be forthcoming.” *Facts* ¶10-11. The Release does not say \$17,864.85 “will be forthcoming.” *Id.* Also, the Release states that it is contractual, and not a mere recital. *Facts* ¶15. Avery having sent a Release promising that a payment of \$25,000 would be forthcoming, it is not reasonable to believe that previously, plaintiff agreed to accept a payment of only \$17,864.85 to settle his personal injury claim, or that Avery would honestly testify that, previously, plaintiff agreed to accept a payment of only \$17,864.85 to settle his personal injury claim, particularly because the Claim Activity Report contains no entry preceding August 26, 2008, referring to a verbal agreement to pay only \$17,864.85 to plaintiff, and because the Claim Activity Report shows that Avery did not receive settlement approval from Gragson until March 12. The Release would not have included a payment term of \$25,000 if, previously, Mr. Wiechman had verbally accepted a verbal offer for only \$17,864.85.

In a fax on May 6, 2008, defendants repeated their offer to pay \$25,000 to plaintiff, faxing the identical March 12 letter and Release to plaintiff's attorney. *Facts* ¶22. The fax says nothing about a verbal agreement, *Id.* Moreover, if Avery and Mr. Wiechman had previously made a verbal agreement for \$17,864.85, Avery would not have sent a letter in May 2008 promising to “issue payment in the amount of \$25,000” upon receipt of the properly executed release, and she would not have been sending a proposed release in May 2008 promising that a payment of \$25,000 “will be forthcoming.”

In a fax on June 3, 2008, defendants re-repeated their offer to pay \$25,000 to plaintiff, faxing the identical March 12 letter and Release to plaintiff's attorney. *Facts* ¶23. The fax says nothing about a verbal agreement. *Id.* Moreover, if Avery and Mr. Wiechman had previously made a verbal agreement for \$17,864.85, Avery would not have sent a letter in June 2008 promising to “issue payment in the amount of \$25,000” upon receipt of the properly executed release, and she would not have been sending a proposed release in June 2008 promising that a payment of \$25,000 “will be forthcoming.”

Having received from defendants multiple offers to pay \$25,000 to plaintiff, it is not reasonable to believe, and there is no evidence from which to argue, that Mr. Wiechman made a counter-offer of \$17,864.85 or accepted a verbal offer of \$17,864.85.

The settlement agreement was formed on August 26, 2008, the day the properly signed Release was faxed to defendants. *Defendant's Exh. Q; Facts* ¶27. Avery made an entry in the Claim Activity Report which says “Rec'd Properly signed Release of All Claims from clmt's atty” and “Will issue pymt” and “This matter has settled.” *Defendant's Exh. C*, p. 42.

The telephone message left for Mr. Wiechman on September 5, 2009, stating Avery “wants to remind you that they reimbursed the PIP carrier \$7,153.15” (*Ins. Cos. Exh. Z*, seventh page), further confirms the absence of a verbal agreement. If there had been a verbal agreement, Avery would have left a message reminding Mr. Wiechman of the verbal agreement to pay plaintiff only \$17,864.85. That was not the message.

Neither of the two letters authored by defendants' attorney claims there was a verbal agreement to pay \$17,864.85 to plaintiff to settle. *Facts* ¶38. On February 26, 2009, Hummer admitted that defendant CPI “made a settlement offer to you for its policy limit of \$25,000 *without mention of the deduction for PIP paid.*” *Id.* He made no mention of, and did not claim there was, a verbal agreement to pay \$17,864.85. *Id.* On March 17, 2009, Hummer admitted plaintiff had accepted defendants' offer: “about five months later (August 26) you accept that offer.” *Id.* He made no mention of, and did not claim there was, a verbal agreement.

Id. Stating that the offer was accepted “August 26” completely and totally belies the contention that Mr. Wiechman accepted a verbal offer for only \$17,864.85.

None of Avery's letters say there was a verbal agreement to pay \$17,864.85 to plaintiff to settle. *Facts* ¶37. For example, in her letter of October 2, 2008, Avery stated “[w]e extended an *offer* to you for your client on March 12, 2008” *Facts* ¶33. She mentions nothing about a verbal agreement. *Id.* In a letter from Avery, dated January 22, 2009, Avery wrote that “[t]his letter is a follow-up to our offer and your acceptance of our offer.” Avery does not say there was verbal agreement to pay only \$17,864.85. *Facts* ¶34.

Avery uses the phrase “the remaining balance of our insured's policy limit” to mean “\$17,846.85.” *Facts* ¶35. In a letter from Avery, dated January 22, 2009, Avery said “the remaining balance of our insured's policy limit is \$17,846.85.” After August 26, 2008, similar phrases were used to denote “\$17,864.85.” *Id.* For example, in their Claim Activity Report, defendants used the phrase “inclusive of the lien” to mean “\$17,846.85.” *Id.* In answer to interrogatories, defendants used the phrase “policy limit remaining at the time of the conclusion of the claim” to mean “\$17,846.85.” *Id.*

However, neither Avery's letter of March 12, 2008, nor the Release use “the remaining balance of our insured's policy limit” or “inclusive of the lien” or “policy limit remaining at the time of the conclusion of the claim” or any such similar verbiage indicating the payment amount would be \$17,864.85 instead of \$25,000. *Facts* ¶36.

It is uncontroverted “CPI never paid \$25,000 to Plaintiff *due to* the prior payment of \$7,153.15 to State Farm” *Amended Motion*, p. 8, ¶36 (emphasis added); *supra*, p. 8, ¶36. This shows there was no verbal agreement to pay \$17,864.85. After all, if there had been a verbal agreement to pay only \$17,864.85, then the reason CPI never paid \$25,000 to plaintiff would have been due to the verbal agreement to pay only \$17,864.85.

The only evidence of mutual outward manifestations or expressions of assent of the parties is the offer memorialized by Avery's letter of March 12, 2008, accompanied by defendants' standard form Release of All Claims, and plaintiff's acceptance of the offer by delivering the signed Release to defendants on August 26, 2008. The letter and the Release make clear that the parties outwardly manifested or expressed mutual assent to a payment to plaintiff of \$25,000, not \$17,864.85. The \$25,000 settlement attained the goals of the defendants: to settle plaintiff's personal injury claim and to avoid involving an attorney. *Facts* ¶¶4-5. The Insurance Companies did not express a goal to settle plaintiff's personal injury claim for \$ 17,864.85.

Terry Bivens, on which defendant relies (*Amended Motion*, p. 26), is inapposite. There, the claimant alleged an oral agreement which modified the written agreement; the three year statute of limitations applied to the enforcement of the oral agreement. *Amended Motion*, p. 26. Here, it is the defendants who have alleged, and have failed to prove, an oral agreement so as to invoke the three year statute of limitations.

Defendant falsely alleges that Mr. Wiechman “was willing to take whatever the limit was at that time.” *Amended Motion*, p. 26. Defendant references no evidence for this allegation. *Id.* Defendant includes no “contention of fact” for the false allegation. *Id.* at 3-16. The allegation is not truthful. During deposition examination by defendants' attorney, Mr. Wiechman testified that, if Avery's letter of March 12, 2008, had offered policy limits less the \$7,135.15 amount reimbursed to State Farm for PIP benefits, then “[w]e wouldn't have settled. I can tell you that.” *Facts* ¶57. There would have been no settlement “[b]ecause we wouldn't have settled for anything less than \$25,000. We had a claim for 85,000 plus.” *Id.* There would have been no settlement for anything less than \$25,000, *Id.*

Defendants have fabricated the “verbal agreement” allegation to support a phony statute of limitations defense and to take advantage of their failure to keep track of Avery's whereabouts. This is an action upon an agreement, contract or promise in writing. The amount of the recovery sought is set forth in defendants' written, standard form release - \$25,000, and in the letter of March 12, 2008 — \$25,000. Accordingly, the five year statute of limitations applies.

The breach of the settlement agreement occurred in August 2008 when the settlement amount of \$25,000 was not paid. Plaintiff commenced this action in March 2013. This action was commenced within the five year statute of limitations. Accordingly, the defendant is not entitled to summary judgment.

C. Issues Which Are Not Material Under the Governing Substantive Law.

Defendant asserts that plaintiffs attorney allegedly knew or should have known of this and that, including that, after the payment of \$7,135.15 for the subrogation demand, the remaining policy limits were \$17,864.86. Plaintiff disputes the assertion. *See supra*, pp. 17-18. ¶98. The dispute is not material. “[T]he facts subject to the dispute must be material to the conclusive issues in the case.” *O’Brien v. Leegin Creative Leather Products, Inc.*, 294 Kan. 318, 330, 277 P.3d 1062 (2012). The “state of mind” of the contracting parties is neither material nor the applicable legal standard, and is no substitute for an “outward manifestation or expression of assent” to a lesser payment of \$17,864.85. The “state of mind” argument explains why defendant neither states nor applies the proper legal standard for determining whether there was a “meeting of the minds” on paying plaintiff only \$17,864.85 instead of \$25,000.

D. Plaintiff Has Come Forward With Evidence Showing the Agreed Payment Term Is In Written Form, So the Five Year Statute of Limitations Applies.

Even if defendant had satisfied his initial burden of showing evidence of a verbal agreement to pay only \$17,864.85 to plaintiff (which he has not), he would still not be entitled to summary judgment because plaintiff has come forward with a mountain of evidence showing that the agreed payment term was \$25,000 and was in writing, and showing defendant is not entitled to judgment as a matter of law. *See supra*, pp. 21-28, ¶¶1-39; pp. 32-33, ¶¶56-57; pp. 33-46. Accordingly, the statute of limitations provides no basis for granting summary judgment.

E. Miscellaneous

If, for some reason, the Court should decide it is material as to whether Mr. Wiechman should or should not have known of the subrogation payment prior to August 26, 2008, then plaintiff points out that there is absolutely no evidence showing that, on or prior to August 26, 2008, Mr. Wiechman knew or should have known of the subrogation payment or that the remaining policy limits were less than \$25,000. To the contrary, the letter from defendant CPI to plaintiff, dated July 20, 2006, which was provided to Mr. Wiechman, requested a medical authorization and stated that CPI was “unable to consider reimbursement unless we have all of the medical records and bills to support their claim. *Defendant’s Exh. I*. Mr. Wiechman relied on that representation and declined to provide medical bills and records until February 2008, believing that CPI would not consider reimbursing State Farm without the medical records and bills which Mr. Wiechman delayed providing. *See supra*, pp. 17-18, ¶98; Facts ¶56. Prior to September 2008, Mr. Wiechman did not know that defendants would pay or had paid the subrogation demand. *Id.* There is no entry in the Claim Activity Report preceding September 2008 of defendants telling plaintiff or Mr. Wiechman that CPI would pay or had paid the subrogation demand. *Id.* Defendants concealed the fact of CPI paying \$7,135.15 to State Farm until after the settlement was entered. There is no letter from defendant preceding September 2008 of defendants telling plaintiff or Mr. Wiechman that CPI would pay or had paid the subrogation demand. *Id.* There is no letter inquiring as to whether Mr. Wiechman or plaintiff objects to CPI paying the subrogation demand. *Id.* Consequently, Mr. Wiechman did not know and had no reason to know of the subrogation payment, or that the remaining policy limits were less than \$25,000, until after the settlement agreement.

II. DEFENDANT IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE AFFIRMATIVE DEFENSE OF LACHES.

Defendant argues that plaintiff's written contract claim is barred by laches. *Amended Motion*, pp. 17-20. Defendants pled the affirmative defense of laches. *Defendants' Joint Answer*, ¶¶7-8. The party asserting an affirmative defense bears the burden of proving its applicability. See *Admire Bank & Trust v. City of Emporia*, 250 Kan. 688, 693, 829 P.2d 578 (1992); *State ex rel. Stoval v. Meneley*, 271 Kan. 355, 389, 22 P.3d 124 (2001) (party asserting affirmative defense bears burden of proof).

For several reasons, defendant is not entitled to summary judgment on their affirmative defense of laches. First, defendant has failed to satisfy his initial burden of showing evidence that laches even applies. *Amended Motion*, pp. 17-20. He simply presumes it applies to plaintiff's breach of contract notwithstanding that a Kansas statute specifies the limitations period by which time the action must be brought to avoid being barred. *Id.* Judge Lahey has already ruled that laches has no application whatsoever because a Kansas statute specifies the limitations period by which time the action must be commenced. In fact, as Judge Lahey ruled, laches has no application to this action because a statute supplies the time by which it must be brought to avoid being barred. See *infra*, pp. 48-52.

Second, defendant has failed to satisfy his initial burden of showing evidence of each essential element of their laches defense. He quotes Kansas case law stating that laches "is defined as neglect to assert a right or claim which, taken together with the lapse of time and other circumstances causing prejudice to the adverse party ... *Amended Petition*, p. 17. He quotes Kansas case law stating that the neglect element must be "for an unreasonable and unexplained length of time, under circumstances permitting diligence ..." *Id.* He quotes Kansas case law stating that "mere lapse of time alone does not constitute laches but if delay has misled other parties to their prejudice, the bar of laches may be invoked." *id.* The Kansas case law on which he relies makes clear that the essential elements of laches include neglect to assert a claim for an unreasonable and unexplained length of time which misled the adverse parties causing prejudice.

Here, defendant has —

- (a) failed to satisfy his initial burden of showing evidence of neglect on the part of plaintiff to assert his breach of contract claim, *infra*, pp. 52-54;
- (b) failed to satisfy his initial burden of showing evidence that the lapse of time was unreasonable and unexplained, *infra*, pp. 54-56;
- (c) failed to satisfy his initial burden of showing evidence that he misled by the lapse of time; *infra*, pp. 56-57; and
- (d) failed to satisfy his initial burden of showing evidence he was prejudiced by the lapse of time, *infra*, pp. 57-61.

Third, in addition to his failure to satisfy his initial burden of showing evidence of the essential elements of laches, defendant is not entitled to summary judgment on the affirmative defense of laches because plaintiff has come forward with a mountain of evidence showing that laches does not apply and that the essential elements of laches are absent. See *infra*, p. 61.

A. Defendant Has Failed To Satisfy His Initial Burden.

1. Defendant has failed to satisfy his initial burden of showing evidence that laches applies to an action for which there exists an applicable statute of limitations.

Under *Yeager v. National Cooperative Refinery Ass'n*, 205 Kan. 504, 509, 470 P.2d 797 (1970), and its progeny, laches does not apply to a cause of action brought within an applicable statute of limitations, and this principle includes equitable causes of action where there is a corresponding legal right or remedy and a statute of limitations applicable to that corresponding legal right or remedy (hereinafter "the Yeager Rule"). The Yeager Rule has been stated and applied in the three Kansas Supreme Court cases and the one Kansas Court of Appeals case where the issue was raised. See *Yeager v. National Cooperative Refinery Ass'n*, 205 Kan. 504, 509, 470 P.2d 797 (1970) (doctrine of laches has no relevance where 2-year statute of limitations applies);

Jennings v. Jennings, 211 Kan. 515, 527, 507 P.2d 241 (1973)(following the rule in *Yeager*); *Boucek v. Boucek*, 297 Kan. 865, 871, 305 P.3d 597 (2013)(“When there is no statute of limitations problem, there is little room for application of the equitable doctrine of laches.”); *State v. Chavez-Aguilar*, 2011 WL 6382742, *11 (Kan.App., December 16, 2011)(unpublished opinion) (attached, *Exhibit 50*)(“Because the statute governing motions to withdraw pleas after sentencing now contains an explicit time limitation to file such a motion, any consideration of the equitable doctrine of laches no longer appears to be necessary or appropriate in determining whether a motion to withdraw plea should be granted”). In each and every case where the Kansas appellate court faced and answered the issue of whether laches applies notwithstanding the existence of a statutory limitations period governing the claim, the appellate court has ruled that laches does not apply. There exists no Kansas case wherein the issue was raised and decided by the appellate court in which the appellate court ruled that laches applied notwithstanding that a statute supplied the applicable limitations period. In this case, a statute supplies the applicable limitations period — five years. See K.S.A. 60-511(1). Therefore, laches does not apply.

In *Yeager v. National Cooperative Refinery Ass'n*, plaintiff sought an accounting for her share of oil and gas royalties from an oil and gas lease located in Oklahoma. *Yeager, supra*, 205 Kan. at 505 (“[I]n this lawsuit, the plaintiff, M. P. Yeager, who owns an interest in an overriding royalty, seeks and accounting from the defendant ... for a share of the oil produced” and purchased by defendant); at 507 (“[t]he present action for an accounting was commenced against N.C.R.A. July 20, 1966”). The trial court granted Mrs. Yeager judgment against NCRA, but reserved questions relating to the accounting itself pending the appeal. *Yeager, supra*, 205 Kan. at 505, 507. On appeal, NCRA argued plaintiff's claim was barred by the statute of limitations. *Id.* at 507 (“On the present appeal, the defendant ... advance these arguments: (1) That plaintiff's claim is barred by the statute of limitations”). The Court first addressed “defendant's contention that the plaintiff's claim is barred by the statute of limitations.” *Yeager, supra*, 205 Kan. at 508. The Court agreed that, if there is no applicable statute of limitations, then laches applies:

“[Plaintiff argues] that in a purely equitable action for an accounting, where there is no corresponding legal right or remedy, the statute of limitations does not apply at all; that the doctrine of laches, alone, will defeat the cause of action. We find no great fault with these assertions as abstract statements of law, but believe they have no application here.

Yeager, supra, 205 Kan. at 509. However, if a statute of limitations applies to the claim, then laches does not apply:

In our view of the circumstances attending the instant case, Mrs. Yeager did have a corresponding legal remedy; she might have sued to recover damages for N.C.R.A.'s alleged interference with her assignor's efforts to obtain a valid lease. The rule set forth in 30A C.J.S. *Equity* s 131, p. 90, is pertinent:

“Where there is a corresponding legal right or remedy, (as we believe there is here) although equity may have exclusive jurisdiction over the enforcement of the right, courts of equity ordinarily will apply the statute of limitations by analogy * * *.”

Yeager, supra, 205 Kan. at 509. Because a two-year statute of limitations applied to plaintiff's claim, laches had no relevance:

“We are forced to conclude that the doctrine of laches has no relevance to the facts in this case, but that the two-year statute of limitations applies. Mrs. Yeager must have commenced this lawsuit within two years from the time her asserted cause of action accrued.”

Yeager, supra, 205 Kan. at 510.

Under *Yeager*, laches has no application even to an equitable action where a statute of limitations applies to a corresponding legal right or remedy of the equitable action. Here, the five year statute of limitations applies to plaintiff's legal right and plaintiff's legal remedy. The legal right is breach of a written settlement agreement, and the legal remedy is the recovery of a money judgment for the \$25,000 contract amount. Under the *Yeager* rule, laches “has no relevance” to plaintiff's claim.

In *Jennings*, trust beneficiaries sought to enjoin another beneficiary from transferring or alienating shares of corporate stock in her possession and to impress a trust upon the stock. Defendant asserted laches. The Court refused to apply laches and followed the rule announced in *Yeager*.

Defendant attempts to apply the rule of laches to bar the plaintiffs' cause of action, claiming they should not be allowed to pursue this action by reason of their long delay in asserting their rights. To the contrary is *Yeager v. National Cooperative Refinery Ass'n*, 205 Kan. 504, 470 P.2d 797. It was held therein that when a statute fixes a limitation period for a claim asserted in a court of law, a court of equity will by analogy follow statutory limits when the claim is raised in an equitable proceeding rather than applying the doctrine of laches.

Jennings v. Jennings, *supra*, 211 Kan. at 527.

In *Boucek v. Boucek*, 297 Kan. 865, 305 P.3d 597 (2013), a Will beneficiary sued executors of the estate, asserting claims for breach of contract, breach of trust, and constructive fraud. *Id.* at 867-68, The district court granted summary judgment to the executors and the Will beneficiary appealed on the grounds of collateral estoppel and *res judicata*. *Id.* at 868. The Court of Appeals affirmed for different reasons. *Id.* at 868-69. The Supreme Court granted review and considered the defenses of statute of limitations and laches. *Id.* at 870-872. The court ruled that the non-claim statute was the applicable statute of limitations for purposes of the breach of contract action, and that the action was timely filed. *Id.* at 871. The court ruled that the claims for breach of trust and constructive fraud were subject to the two year statute of limitations, and that those claims were timely filed. *Id.* Next, the Court addressed defendants' affirmative defense of laches, but needed few words to reject the defense, stating as follows:

“When there is no statute of limitations problem, there is little room for application of the equitable doctrine of laches.”

Id. at 871. Because a statute of limitations governed the claims, laches had no application whatsoever. *Id.*

Recently, the Court of Appeals had the chance to revisit the *Yeager* rule and applied it to the limitations period for filing motions to withdraw pleas after sentencing, ruling that consideration of laches was not appropriate because a limitations statute governed the filing of such motions:

We also note that effective April 9, 2009, the Kansas Legislature enacted a new 1-year statute of limitations for filing motions to withdraw pleas after sentencing. K.S.A.2010 Supp. 22-3210(e). *Because the statute governing motions to withdraw pleas after sentencing now contains an explicit time limitation to file such a motion, any consideration of the equitable doctrine of laches no longer appears to be necessary or appropriate in determining whether a motion to withdraw plea should be granted.* See *Yeager v. National Cooperative Refinery Ass'n*, 205 Kan. 504, 510, 470 P.2d 797 (1970) (doctrine of laches has no relevance where 2-year statute of limitations applies).

State v. Chavez-Aguilar, 2011 WL 6382742, *11 (Kan.App., December 16, 2011) (unpublished opinion)(underlining added). See also *Clark v. Amoco Production Co.*, 794 F.2d 967, 972 (5th Cir. 1986) (“the doctrine of laches is inapplicable to an action that comes within the provisions of a particular statute of limitations”); *FDIC v. Niblo*, 821 F.Supp. 441, 451 (N.D.Tex. 1993) (“the doctrine of laches is inapplicable to an action that comes within the provision of a particular statute of limitations”).

The *Yeager* Rule makes sense. When a statute adopted by the legislature specifies a limitations period by which time an action must be commenced, that period should govern. *The statute of limitations itself takes delay into account.* For example, Kansas has a three year statute to claims based on verbal agreements, and a five year statute applies to claims based on written agreements, Laches cannot override a statutory limitations period. Rather, laches fills the vacuum for causes of action where there is no applicable statute of limitations and no corresponding legal right or remedy governed by a statute of limitations. See 1 D. Dobbs, *law of Remedies* § 2.4(4), p. 104 (2d ed. 1993) (“laches should be limited to cases in which no statute of limitations applies”).

Moreover, applying a specific limitations period adopted by the Kansas Legislature for recovering on written contracts provides uniformity and certainty to the time by which an action must be brought. A contrary rule would unnecessarily increase litigation, as this case proves.

In this case, Judge Lahey has already adopted the *Yeager* rule and has already ruled that laches has no application to plaintiff's claim. *Facts* ¶¶40-41. There is no reason for conflicting rulings between district judges on this issue. Kansas law is clear. Because a statute of limitations applies, laches has no application.

2. Defendant has failed to satisfy his initial burden of showing evidence of neglect to assert the claim.

Defendant quotes Kansas case law stating that laches “is defined as neglect to assert a right or claim ... *Amended Petition*, p. 17. The Kansas case law on which defendant relies makes clear that an essential element of laches is neglect to assert a claim. Defendant has failed to satisfy his initial burden of showing evidence of neglect by plaintiff to assert his claim for breach of contract. *Amended Petition*, pp. 17-22. Indeed, he does not even use the word “neglect,” much less argue neglect. *Id.*

The evidence proffered by defendant shows there was no neglect to assert the breach of contract claim. Numerous entries in the Claim Activity Report (*Defendant's Exh. C*) show that, upon learning plaintiff would not be paid the full \$25,000 amount, Mr. Wiechman immediately asserted plaintiff's claim for breach of contract by threatening a lawsuit and demanding payment of \$25,000. *Defendant's Exh. C*. See also *Facts* ¶¶42-43. The following are several examples of the entries:

1. An entry on October 1, 2008, states that, on September 26, 2008, Mr. Wiechman demanded payment of \$25,000, and that he would “sue” if defendants failed to make payment.
2. An entry on October 16, 2008, states that Mr. Wiechman, again, informed defendants that he would file a lawsuit.
3. An entry on February 25, 2009, states that Mr. Wiechman, again, informed defendants that he was filing a lawsuit “for failing to honor our agreement.”

Defendant's Exh. C, pp. 44-46. See also *Facts* ¶42. Thereafter, Mr. Wiechman continued his demands for payment of \$25,000;

4. On May 11, 2012, Mr. Wiechman, again, made demand on defendants for payment of \$25,000.
5. On June 6, 2012, Mr. Wiechman, again, made demand on defendants.
6. On June 19, 2012, Mr. Wiechman, again, made demand on defendants for payment of \$25,000.

Defendant's Exh. C, pp. 48, 50-53. See also *Facts* ¶43. The Insurance Companies were on notice of both the adverse claim and the prospective lawsuit.

By February 2009 (if not earlier), the Insurance Companies had hired and were consulting with a lawyer. *Defendant's Exh. C*, p. 46. See also *Facts* ¶44. Their lawyer authored letters on the threatened lawsuit. *Facts* ¶44. The Insurance Companies could have filed a lawsuit for rescission or reformation or declaratory judgment, but chose not to. *Facts* ¶45. They could have taken Avery's statement. *Id.* They obviously spoke with Avery. *Id.* It is likely Avery's recitation of what happened did not help defendants' legal position, so defendants chose not to record her statement. *Id.* That is on the defendants and their lawyer, not plaintiff. The Insurance Companies say that, in August 2011, Avery left the employ of CPI. If they failed to keep track of Avery's whereabouts, that neglect is on the defendants and their lawyer, not plaintiff.

3. Defendant has failed to satisfy his initial burden of showing evidence that the lapse of time was unreasonable and unexplained.

Defendants quotes Kansas case law stating that the neglect must be “for an unreasonable and *unexplained* length of time, under circumstances permitting diligence ...” *Second Amended Petition*, p. 22 (underlining added). In *Osincup v. Henthorn*, 89 Kan. 58, 130 P. 652 (1913), to which defendant cites, *see Amended Petition*, p. 17, the Court ruled that laches will not bar a recovery where there is a reasonable excuse for nonaction of a party. The Kansas case law on which defendant relies makes clear that an essential element of laches is that the lapse of time must be “unreasonable” and “unexplained.” Defendant has failed to satisfy his initial burden of showing evidence that the lapse of time was both “unreasonable” and “unexplained.” *See Amended Petition*, pp. 17-22. To the contrary, the evidence proffered by defendant shows that the lapse of time was not unreasonable.

Mr. Wiechman handled the personal injury claim and the settlement negotiations; he was likely to be a witness in this case, so he could not try the case for his client; and plaintiffs substitute attorney-of-choice did not become available to represent plaintiff until the beginning of 2013, accounting for the filing of the action in early March 2013. *Facts* ¶46.

From October 2007 to early 2013, Mr. Beal was involved in a \$34 million legal malpractice lawsuit filed in Butler County, Kansas, representing three former stockholders, directors and officers of a Kansas Corporation against a large Kansas City law firm and two of its lawyers. He did not become available to represent plaintiff until the beginning of 2013. *Facts* ¶47.

The exercise of plaintiffs right to his or her attorney of choice is not unreasonable. “The right to be represented by counsel of choice is an important one ...,” *Associated Wholesale Grocers, Inc. v. Amehcold Corp.*, 266 Kan. 1047, 1057, 975 P.2d 231 (1999). *See also LeaseAmerica Corp. v. Stewart*, 19 K.A.2d 740, 750, 876 P.2d 184 (1994)(same). That” right is frequently discussed in connection with motions to disqualify the attorney for a party, which make clear that a party litigant in a civil proceeding has a fundamental right to employ and be heard by counsel of his or her choosing;

[A] party litigant in a civil proceeding still has a fundamental right to *employ* and be heard by counsel of his or her own choosing. The right to select counsel without state interference is implied from the nature of the attorney-client relationship in our adversarial system of justice, where an attorney acts as the personal agent of the client and not the state. It is also grounded in the due process right of an individual to make decisions affecting litigation placing his or her property at risk. An individual's decision to employ a particular attorney can have profound effects on the ultimate outcome of litigation. Legal practitioners are not interchangeable commodities. Personal qualities and professional abilities differ from one attorney to another, making the choice of a legal practitioner critical both in terms of the quality of the attorney-client relationship and the type and skillfulness of the professional services to be rendered. (Citations omitted).

Arkansas Valley State Bank v. Phillips, 171 P.3d 899, 904-05 (Okla. 2007).

In this case. Judge Vining has already stated that “I consider quite clearly the choice of counsel as a paramount virtue of a litigant. It has to be given great weight.” *Facts* ¶48.

The reasonableness of the nonaction is given broad leeway. In *Moore v. Phillips*, 6 Kan.App.2d 94, 627 P.2d 831 (1981), from which defendant quotes extensively, *see Amended Motion*, p. 17-18, the Court affirmed the rejection of the defense of laches by the district court because the reason for nonaction was not unreasonable, and because there was no prejudice. *Moore*, 6 Kan.App.2d at 98-99. The remaindermen brought an action against the estate of the life tenant to recover damages for deterioration of a farmhouse resulting from neglect of the life tenant. *Id.* at 94. Over an 11 year period, the remaindermen had expressed concern about the deterioration of the property, but filed no action until after the life tenant passed away. *Id.* at 96. The remaindermen explained the reason for the lapse of time, and the explanations was not unreasonable. The life tenant was an **elderly** woman; she died at the age of 83. *Id.* at 99. The remaindermen, the estranged daughter of the life tenant, did not wish to aggravate her mother and take funds which her mother might need during her lifetime. *Id.* Under these circumstances,

the 11 year lapse of time was not unreasonable; laches did not require the remaindermen to file an action during the lifetime of the remaindermen. *Id.*

Defendant cites no legal authority whatsoever that time lapse to accommodate a party's exercise of the right to counsel of choice is unreasonable. *Amended Motion*, pp. 17-22. Indeed, his legal argument ignores the fact that the cause of the lapse of time was so that plaintiff's counsel of choice could represent plaintiff. *Id.* Such an omission speaks volumes; it says that even defendant cannot, in good faith, meet his initial burden on this element of his affirmative defense. Plaintiff has explained the lapse of time, and defendant has failed his initial burden to show the absence of an explanation and to show that the explanation is not reasonable.

4. Defendant has failed to satisfy his initial burden of showing evidence that he was misled.

Defendant quotes Kansas case law stating “mere lapse of time alone does not constitute laches but if delay has *misled* other parties to their prejudice, the bar of laches may be invoked.” *Amended Motion*, p. 17 (underlining added). In *Calkin v. Hudson*, 156 Kan. 308, 133 P.2d 177 (1943), to which defendant cites, *Amended Motion*, p. 17, the Court stated mere lapse of time does not constitute laches; rather, the delay must have misled the adverse parties to their prejudice. *Calkin v. Hudson, supra*, 156 Kan. at 318. The Kansas case law on which the defendant relies makes clear that an essential element of laches is that the lapse of time must have misled other parties. Defendant has failed to satisfy his initial burden of showing evidence that the lapse of time misled him. See *Amended Motion*, pp. 17-22.

To the contrary, the evidence proffered by defendant shows the lapse of time did not mislead him. The Claim Activity Report contains no entry to the effect that defendants were misled by the lapse of time. *Defendant's Exh. C. See also Facts ¶49.* Defendants had notice of plaintiffs demand for payment of \$25,000, and they had notice of plaintiffs threat to file a lawsuit. Moreover, defendant makes no showing that Avery's departure was on account of plaintiff having not filed this action by August 2011, or on account of plaintiff having somehow misled defendants.

5. Defendant has failed to satisfy his initial burden of showing evidence that he was prejudiced by the lapse of time.

Defendant quotes Kansas case law stating “mere lapse of time alone does not constitute laches but if delay has misled other parties to their prejudice, the bar of laches may be invoked,” *Amended Motion*, p. 17 (underlining added). The Kansas case law on which defendant relies makes clear that an essential element of laches is that the lapse of time must have misled other parties to their prejudice.

Defendant argues that he is prejudiced by the lapse of time in three respects: (1) incurring prejudgment interest, (2) the absence of Avery to testify “about oral settlement negotiations that could reduce the statute of limitations to 3 years,” “and (3) the expense of traveling to California “if Avery could be found to depose her when she could have been deposed up to the time she left CPFs employment on August 11, 2011 ...” *Amended Petition*, p. 18. The Insurance Companies have failed to satisfy their initial burden of showing evidence that the lapse of time misled the Insurance Companies to their prejudice. See *Amended Motion*, pp. 17-20. They have not been prejudiced by the exercise of plaintiff's right to his attorney of choice.

a. Prejudgment Interest

Defendants profited greatly from the lapse of time; they have not been prejudiced at all. They have had the use of the \$25,000 settlement amount for six years. Invested conservatively, such as a mutual fund or ETF which replicates the return on the S&P 500, the settlement amount would have increased by over \$13,685 from August 26, 2008, to July 11, 2014 (August 26, 2008 — 1,271.51 close; July 11, 2014 — 1967.57 close; 54.74% gain). In contrast,, from August 26, 2008, to August 11, 2011 (the date Avery left CPI), the settlement amount would have *decreased* by over \$1,945 (August 26, 2008 — 1,271.51 close; August 11,

2011 - 1,172.64 close; 7.786% loss). Even under a conservative investment, the lapse of time of which defendants complain accounts provided a benefit of over \$15,630. *Facts* ¶50.

Defendants frigate the calculation of the monetary *detriment* caused by the lapse of time. First, only the amount in dispute — \$7,135.15 — should be used to determine the monetary detriment caused by the lapse of time. Defendants claim the settlement amount is \$17,864.85. Nevertheless, they withheld payment of the \$17,864.85 amount they claim was owed. Accrued interest on the \$17,864.85 amount was caused solely by the defendants' decision to withhold payment of the amount they claimed was owed. Second, the monetary detriment should be calculated from August 11, 2011 - the only date provided by defendants as to when prejudice allegedly struck. Consequently, the monetary detriment is only \$2,141 (\$7,135.15 times 10% times three years (August 11, 2011, to August 11, 2014)). *Facts* ¶51.

The net monetary benefit from the lapse of time is over \$11,540 (\$13,685 less \$2,141). In other words, the lapse of time has provided defendants with a windfall exceeding \$11,540. The windfall of \$11,540 continues to increase. *Facts* ¶52.⁸

In any event, the allegation that the lapse of time caused prejudgment interest to accrue is spurious on its face. The failure of the defendants to honor their agreement and pay \$25,000 to plaintiff caused prejudgment interest to accrue. Defendants had the means and capability to pay. Nothing plaintiff did prevented defendants from paying the agreed amount. The proximate cause of the accrual of interest is the decision of the defendants not to honor their settlement agreement.

b. Avery Testimony

The allegation that defendant is prejudiced by the absence of Avery's testimony about “oral negotiations” that could reduce the statute of limitations to 3 years is spurious on its face. Negotiations are just that; and nothing more than negotiations. Be they oral or written, negotiations are no substitute for mutual assent. Consequently, the absence of Avery's testimony about “oral negotiations” cannot be prejudicial.

Defendants make no showing whatsoever that Avery's departure from CPI was on account of plaintiff having not filed this action by August 2011. There is no connection between Avery's departure and the lapse of time.

Additionally, for three reasons, defendant has failed his initial burden of showing that Avery's absent testimony is material or somehow impacts his statute of limitations defense. First, under Kansas law, a subsequent written agreement embodies all prior oral understandings and agreements. *See supra*, pp. 35-36. Consequently, Avery's testimony about verbal understandings or agreements with Mr. Wiechman (if any) preceding August 26, 2008, would not alter or affect the written agreement of the parties stating that the payment term is \$25,000. *Id.*

Second, under the parol evidence rule, testimony of an alleged verbal agreement to pay plaintiff only \$17,864.85 would not be admissible because it conflicts with and is inconsistent with the written settlement agreement to pay \$25,000 to plaintiff. *See supra*, pp. 36-38. Therefore, again, Avery's testimony about oral understandings or agreements preceding August 26, 2008 would not alter or affect the written agreement of the parties stating that the payment term is \$25,000. *Id.*

Third, the evidence proffered by defendant shows there was no outward manifestation or expression of assent by plaintiff to accept a payment of only \$17,864.85 to settle his personal injury claims. It is not reasonably likely Avery would testify that, in the telephone conversation with Mr. Wiechman preceding August 26, 2008, there was an outward manifestation or expression of assent on the part of Mr. Wiechman to accept a payment of only \$17,864.85 instead of the \$25,000 payment offered. Defendants have fabricated the “verbal agreement”. allegation to support a phony laches defense. *See supra*, pp. 38-43.

Additionally, there is no evidence that Avery could not be located. To the contrary, there is evidence defendants located Avery in California, and, thereafter, defendants looked for Avery in Oklahoma and Missouri and avoided looking for her in California,

preferring not to locate her at all. *Facts* ¶54; *see supra.*, pp. 4-5, ¶11. Also, by complaining of the additional expense of traveling to take her deposition, defendants concede Avery has been or can be located.

c. Expense To Travel To California

Defendants say they have not found Avery, so there exists no prospective expense to travel to California to depose Avery and no travel expense of which to complain. The “possibility” they may locate her in California can hardly rise to the level of prejudice.

Moreover, defendant makes no showing of the amount of the alleged expense. The absence of this evidence also defeats the contention of prejudice.

Also, the net monetary benefit to defendants from the lapse of time (\$11,540) far exceeds the expense of a round trip plane ticket on Southwest Airlines (less than \$500). *Facts* ¶55. This fact also defeats the contention of prejudice.

Also, the Insurance Agreement states that the expenses of litigation are the responsibility of the Insurance Companies, not defendant. *Plaintiff's Exhibit 5*, p. 2 (“We will ... pay all defense costs”). The expense of a trip to depose Avery would be paid by the Insurance Companies, not by defendant, and there has been no showing otherwise.

B. Plaintiff Has Come Forward With Evidence Showing the Inapplicability of Laches and the Absence of Each and Every Essential Element of Laches.

Even if defendant had satisfied his initial burden of showing evidence of each essential element of laches (which he has not), he would still not be entitled to summary judgment because plaintiff has come forward with specific facts supported by a mountain of evidence showing laches is not applicable, showing the absence of each and every essential element of laches, and showing defendant is not entitled to judgment as a matter of law. *See supra*, pp. 28-32, ¶¶40-55; pp. 46-61. Laches provides no basis for the entry of summary judgment for defendant.

III. DEFENDANT IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE TWO ASYMMETRIC, INCONGRUENT DEFENSES.

There exists no legal authority whatsoever protecting insurers and insureds from settlement agreements into which they have freely and voluntarily entered even if the aggregate total amount (settlement amount plus previously paid amount on subrogation demand) exceeds the policy limits. The public policy of Kansas favors freedom to contract, which Kansas law describes as “paramount.” *Heartland Surgical Specialty Hosp., LLC v. Reed*, 48 Kan.App.2d 237, 244, 287 P.3d 933 (2012)(“[T]he paramount public policy is that freedom to contract is not to be interfered with lightly.”).

“Courts have the duty to sustain the legality of a contract in whole or in part when the contract was fairly entered into and it is reasonably possible to do so, rather than seeking loopholes and technical legal grounds for defeating the contract's intended purpose.”

Wichita Clinic, P.A. v. Louis, 39 Kan.App.2d 848, 852, 185 P.3d 946 (2008). Moreover, the “strong policy” of Kansas is that “settlements are to be encouraged” and that “the law encourages settlement” *Bright v. LSI Corp.*, 254 Kan. 853, 858, 869 P.2d 686 (1994)(“LSI's contentions are contrary to our strong policy that settlements are to be encouraged. We have repeatedly affirmed the principle that the law encourages settlement.”) *See Ellis v. Union Pacific R.R. Co.*, 231 Kan. 182, 192, 643 P.2d 158 (1982)(“Settlements are favored in the law.”); *Eggleston v. State Farm Mutual Auto. Ins. Co.*, 21 K.A.2d 573, 574, 906 P.2d 661 (1995)(“[T]he law favors the settlement of disputes.”). “It is an elemental rule that the law favors compromise and settlement of disputes, and generally, in the absence of bad faith or fraud, when parties enter into an agreement settling and adjusting a dispute, neither party is permitted to repudiate it.” *Krantz v. University of Kansas*, 271 Kan. 234, 241-42, 21 P.3d

561 (2001), *See Lewis v. Gilbert*, 14 K.A.2d 201, 202, 785 P.2d 1367 (1990) (“The law favors the compromise and settlement of disputes, and when parties, in the absence of any element of fraud or bad faith, enter into an agreement settling and adjusting a dispute, neither party is permitted to repudiate it.”).

Defendant cannot explicitly ask to be relieved of his agreement. So he implicitly asks to be so relieved in two asymmetric, incongruent defenses — arguments which are out of place and have no application to an action to enforce a settlement agreement.

A. One of the Two Defenses Is An Affirmative Defenses That Has Been Waived Because It Was Not Pled In Defendants' Joint Answer.

The estoppel defense raised by defendant is an affirmative defense. It was not pled. *See* Joint Answer of Defendants to Amended Petition. Affirmative defenses that are not pled are waived. *Kansas Health Care Stabilization Fund v. St. Francis Hospital*, 41 K.A.2d 488, 502, 203 P.3d 33 (2009), *rev. denied* 289 Kan. 1279 (2010); *In re Parentage of Shade*, 34 K.A.2d 895, 903-04, 126 P.3d 445, *rev. denied* 281 Kan. 1378 (2006). Accordingly, the three defenses have been waived.

B. The Two Defenses Should Be Rejected Because They Were Not Disclosed In Response To Plaintiffs Interrogatories.

In interrogatories, defendants were asked to fully disclose any other defenses (which had not been pled). *Plaintiff's Exhibits* 30-32, Nos. 15 and 16. Defendants failed to disclose the three asymmetric, incongruent defenses. *Plaintiff's Exhibit* 33, Nos. 15 and 16.

The Court has discretion to exclude testimony from a witness who is not properly identified during discovery or in pretrial order. *West v. Martin?* 11 Kan.App.2d 55, Syl. ¶1, 713 P.2d 957 (1986). It follows, then, that the Court has discretion to disregard a defense that was not properly disclosed in discovery. Otherwise, litigants would have every incentive to conceal their defenses and perpetuate discovery **abuse**. Accordingly, the Court should exercise its discretion and reject these defenses for failure to comply with the discovery obligations.

C. This Action Is To Enforce A Settlement Agreement, Not To Enforce the Insurance Agreement Between the Insurer and the Insured.

In a section titled “estoppel cannot be used to expand the policy limits,” defendant confuses plaintiff’s action to enforce a settlement agreement with actions to enforce an insurance agreement using an estoppel argument. *Amended Motion*, pp. 20-22. He says “estoppel cannot be used to expand the policy limits,” *Id.* at 25. Of course, plaintiff is neither using “estoppel” nor suing under the insurance agreement. In the cases on which he relies, there was no settlement agreement, and the parties were not seeking to enforce a settlement agreement. *Amended Motion*, pp. 20-21.

For example, defendant relies on *Western Food* (*Amended Motion*, p. 21), where the insured brought an action against the insurer to recover the policy proceeds for the destruction of an airplane. The district court granted summary judgment to the insurer and the insured appealed. A provision in the insurance policy required the pilot to have a valid medical certificate, and the insured admitted the pilot did not have a current medical certificate. The insured argued the insurer was estopped from denying coverage because of implied knowledge. The Court of Appeals applied the general rule that waiver and estoppel cannot be used to expand the scope of an insurance contract and affirmed.

Defendant say that *Western Food* “is still good law” *Amended Motion*, p. 21. Maybe, but that case does not help defendant. Plaintiff is the injured party, not the insured. Plaintiff seeks to recover under the settlement agreement of the insurance companies, not under an insurance agreement to which plaintiff is not a party. Plaintiff’s theory of recovery is breach of the settlement agreement, not waiver or estoppel. *Western Food*, and the other cases on which defendant relies, have no application to this case. Again, there is no legal authority whatsoever protecting insurers and insureds from settlement agreements into which

they have freely and voluntarily entered even if the aggregate total amount (settlement amount plus previously paid amount on subrogation demand) exceeds the policy limits. The defendants were free to agree to pay \$25,000 to plaintiff notwithstanding the prior payment of the subrogation-demand.

D. Plaintiff Is Entitled To Recover the Settlement Amount of \$25,000.

Under Kansas law, plaintiff is entitled to recover the amount which will fairly and justly compensate plaintiff for the damages sustained *as a direct result of the breach of contract*. See P.I.K (4th ed. 2012 Supp.) 124.16 (measure of damages for breach of contract is sum which will fairly and justly compensate plaintiff for damages sustained as a direct result of the breach of contract); *State ex rel. Stovall v. Reliance Ins. Co.*, 278 Kan. 777, 789, 107 P.3d 1219 (2005) (The basic goal in awarding contract damages is to put the nonbreaching party in as good a position as the party would have been had the breach never occurred, without allowing that party a windfall). See also *Restatement (Second of Contracts* § 344(a)(1979) (basic purpose of contract damages is to make a party whole by putting it in as good a position as the party would have been had the contract been performed).

The amount which will fairly and justly compensate plaintiff for damages sustained as a direct result of the breach of contract is \$25,000 - the agreed settlement amount plaintiff never received. The amount which would put plaintiff in as good a position as plaintiff would have been had the breach never occurred is \$25,000 — the agreed settlement amount plaintiff never received. The amount which would make plaintiff whole is \$25,000 — the agreed settlement amount plaintiff never received. Had the settlement agreement been performed, plaintiff would have been paid the \$25,000 settlement amount,

Additionally, under Kansas law, where the breaching party fails to pay a sum of money as agreed under the terms of a contract, the measure of damages is the principal sum agreed to be paid with interest from the time due:

In this action plaintiffs predicated their right to recover damages on the contract itself. Ordinarily, a party who is injured by a breach of a contract is entitled to compensation for the injury sustained, and is to be placed, so far as it can be done by a money award, in the same position he would have occupied if the contract had been performed. Thus, where a defaulting party fails to pay a sum of money as agreed under the terms of a contract, and he has received the consideration for which his promise was made, the measure of damages is, in the absence of special circumstances, the principal sum agreed to be paid with interest thereon from the time it was due. *In* such a situation the amount stipulated in the contract is *prima facie* the measure of recovery.

Steel v. Eagle, 207 Kan. 146, 151, 483 P.2d 1063 (1971) (citations omitted). Applying Kansas law, plaintiff's damages are the \$25,000 amount agreed to be paid with interest.

In a one-half page section titled “no damages,” defendant completely ignore Kansas law on the recovery of damages for breach of contract. *Amended Motion*, pp. 24. Defendant completely ignores that plaintiff is entitled to be compensated for losses sustained *as a direct result of the breach of contract*. Instead, defendant applies a different standard — he speculates (incorrectly) that if the subrogation demand had not been paid, and if the Insurance Companies had honored their settlement agreement and paid the \$25,000 settlement amount, then plaintiff would have had to pay \$7,135.15 to State Farm. *Amended Motion*, p. 24. Of course, what may or may not have happened if the subrogation demand had not been paid, and what may or may not have happened if defendants had honored their settlement agreement, and what may or may not have happened if both had occurred is not material under Kansas law governing contract damages.

Moreover, the Kansas Supreme Court decision cited by defendant refutes his speculative assertion. In *State Farm Mut. Auto Ins. Co. v. Kroeker*, 234 Kan. 636, 670 P.2d 66 (1984), an automobile insurer paid personal injury protection benefits to its insured and brought an action to determine its right to subrogation or reimbursement after the insured entered into a partial settlement of her claim for her husband's death. The district court entered judgment for the insurer, holding that it was entitled to reimbursement from the settlement. The Supreme Court reversed holding that the insurer is not entitled to reimbursement

out of the settlement proceeds where the insured's actual damages equals or exceeds the available liability coverage plus the amount of PIP benefits paid by the insurer; i.e., where there is no double recovery. Here, the aggregate total amount of liability coverage (\$25,000) plus the subrogation claim (\$7,135.85) is far less than plaintiffs actual damages of \$85,000+.

In a letter from State Farm to plaintiff, dated July 11, 2006, State Farm acknowledges that it is entitled to reimbursement from funds collected from the responsible party "provided they are duplicative of our PIP benefits." See *supra*, p. 11, ¶60.

Moreover, the *Kroeker* rule has no application because State Farm's subrogation claim was paid by defendant CPI long before August 26, 2008. the date the Insurance Companies entered into the settlement agreement to pay \$25,000 to plaintiff. Once again, there is no legal authority whatsoever protecting defendants from settlement agreements into which they have freely and voluntarily entered even if the aggregate total amount (settlement amount plus previously paid amount on subrogation demand) exceeds the policy limits. Defendants were free to agree to pay \$25,000 to plaintiff notwithstanding the prior payment of the subrogation demand.

IV. MISCELLANEOUS

A single sentence on the first page of the Amended Motion alleges, in passing, and in conclusory fashion, that Mark Huddleston is entitled to summary judgment for having "played no role in the making or breach of the" settlement agreement. However, there exists no uncontroverted contention of fact pertaining to this allegation. *Amended Motion*, pp. 3-16. Moreover, there exists nothing in the section titled "Arguments and Authorities" to support the allegation. *Id.* at 17-27. Defendant has failed to carry his initial burden of showing both no genuine issue of material fact and entitlement to judgment as a matter of law.

Moreover, in Kansas, an argument not supported with pertinent authority is deemed waived and abandoned:

"A failure to support an argument with pertinent authority or to show why it is sound despite a lack of supporting authority or in the face of contrary authority is akin to failing to brief the issue. Therefore, an argument that is not supported with pertinent authority is deemed waived and abandoned."

Friedman v. Kansas State Bd. of Healing Arts, 296 Kan. 636, 645., 294 P.3d 287 (2013). See also *McCain Foods USA, Inc. v. Central Processors, Inc.*, *supra*, 275 Kan. at 15; *State v. Conley*, 287 Kan. 696, 703, 197 P.3d 837 (2008). Defendant has not supported his argument with pertinent legal authority. Accordingly, the argument should be rejected as having been waived and abandoned.

The settlement offer to plaintiff was made on behalf of defendant Benchmark Insurance and defendant Mark Huddleston. Early in this case, during written discovery, in response to requests for admission, all three defendants admitted that the settlement offer to plaintiff was made on behalf of defendant Benchmark Insurance and defendant Mark Huddleston. *Facts* ¶8. Also, that the settlement offer to plaintiff was made on behalf of both defendant Benchmark Insurance and defendant Mark Huddleston was set forth as an uncontroverted contention of fact in plaintiffs motion for summary judgment filed 12 months ago. See *Plaintiff's Motion For Partial Summary Judgment*, p. 6, ¶13. In response, defendant Huddleston stated that the contention was uncontroverted. See "*Defendant Mark Huddleston's Separate Response To Defendants' Amended Motion For Summary Judgment and Plaintiff's Motion For Partial Summary Judgment*," p. 3 ("Statement of uncontroverted fact no. 13 is uncontroverted.").

CONCLUSION

Summary judgment should granted to plaintiff against defendants. For this reason alone, defendant's motion for summary judgment should be denied.

Defendant has failed to satisfy his initial burden of showing evidence to support his defenses, and has failed to show entitlement to judgment as a matter of law. For this reason alone, defendant's motion for summary judgment should be denied.

Resolving all facts and inferences which may reasonably be drawn from the evidence in favor of plaintiff, and considering the evidence with which plaintiff has come forward, defendant's motion for summary judgment should be denied.

Appendix not available.

Footnotes

- 1 A memorandum opposing a motion for summary judgment must state — in separately numbered paragraphs that correspond to the numbered paragraphs of the movant's memorandum — whether each of the factual contentions are uncontroverted, uncontroverted for purposes of the motion only, or controverted. [Kan.Sup.Ct. Rule 141\(b\)\(1\)](#). Kansas [Supreme Court Rule 141\(b\)\(1\)](#) permits those three, and only those three, types of responses. If controverted, the response must concisely summarize conflicting testimony or evidence and provide precise references to pages, lines and/or paragraphs of the portion of the record on which the non-movant relies to controvert the contention. [Kan. Sup. Ct. Rule.141\(b\)\(1\)\(C\)](#). The following separately numbered paragraphs 1 through 129 — corresponding to the numbered paragraphs of the movant's memorandum — comply with Kansas [Supreme Court Rule 141\(b\)](#).
- 2 *Plaintiff's Exhibits* 1-34 accompanied plaintiff's motion for summary judgment. *Plaintiff's Exhibits* 35-50 accompanied plaintiff's response to the Second Amended Motion For Summary Judgment of defendants Benchmark Insurance Company ("Benchmark Insurance") and Claims Professionals, Inc. ("CPI") (collectively "the Insurance Companies").
- 3 Gragson Deposition Exhibit 20 is three documents.
- 4 The copy of the amended motion for summary judgment served on plaintiff does not contain the deposition transcript of Robert D. Wiechman, Jr. Plaintiff understands that Exhibit Y to the amended motion is the deposition transcript of Robert D. Wiechman, Jr. That deposition transcript also appears as Plaintiff's Exhibit 36.
- 5 The deposition was taken on July 30, 2013. *Defendant's Exh. Y*, p. 1.
- 6 Parol evidence is "evidence given orally." *Black's Law Dictionary* 579 (7th ed. 1999).
- 7 See *Steichschulte v. Jennings*, 297 Kan. 2, 20, 298 P.3d 1083 (2013) ("Paragraph 5 operates as an integration clause, protecting a seller from a buyer's later allegation that the seller made representations not committed to writing upon which the buyer relied."); *UAW-GM Human Resource Or. v. KSL Recreation Corp.*, 579 N.W.2d 411, 421 n.M (Mich.App. 1998) ("The raison d'etre of an integration clause is to prohibit consideration of parol evidence by nullifying agreements not included in the written agreement. See 3 Corbin, Contracts, § 578. To consider parol evidence in interpreting a written contract that includes an integration clause is to accord the integration clause no meaning.").
- 8 Moreover, because of the lapse of time, defendants avoided suffering a monetary detriment of \$1,945.